In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 810

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States District Court for the District of Columbia

Holding a Criminal Term, Grand Jury Sworn in on September 2, 1969

Criminal Case No. ——

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

Grand Jury Original ——

Violations: 18 U.S.C. 1341 (Mail Fraud); 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 2314 (Transportation of Falsely Made, Forged, and Altered Securities); 18 U.S.C. 2 (Aiding and Abetting)

The Grand Jury charges:

COUNT 1

1. From on or about March 15, 1965 and continuing thereafter up to and including February 6, 1967, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants herein, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud Alonzo Shearer, Thelma Shearer, Lawrence Hatton, Edna Hatton, William Jones, Evelyn Jones, Allie Mae Asberry, Bettie P. Staley, Sereta S. Staley, Lucille N. Brooks, Rosa Johnson, Inez Johnson, Rev. Andrew Williams, James Gray, Marion Gray, Sherman Webster, Samuel Duncan, Alice Duncan, George Crutchfield, Ruth Crutchfield, Geneva Gardner, and divers other persons, each and all of whom were members of and constituted a class of persons who possessed and enjoyed a right, title and interest in real property, and are herewith referred to as the Homeowners, and to obtain money and property by false and fraudulent pretenses, promises, and representations which pretenses, promises, and representations the defendants well knew would be and were false and fraudulent when made.

2. It was part of said scheme and artifice to defraud that the defendants would and did operate a corporation trading as Allied Enterprises, Inc. ("Allied"), and would and

did maintain offices at 4550 Rhode Island Avenue, North Brentwood, Maryland, from which address the defendants would and did trade as Allied, and over whose affairs and policies the defendants would and did exert their influence and control.

3. It was a further part of said scheme and artifice to defraud that the defendants would and did cause an intensive sales campaign by telephone solicitors and salesmen to be utilized in order to promote in the District of Columbia and elsewhere the sale of home intercom systems, burglary detection systems, fire control systems, and similar systems.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did directly and indirectly by false and fraudulent pretenses, promises, and representations induce the Homeowners to enter into purported contracts for the installation of said systems, including, but not limited to, the false representation that Homeowners, by providing "Allied" with names and addresses of friends and acquaintances as prospective customers, would be participating in a sales-referral plan which would substantially reduce the cost of said systems to the Homeowners and provide financial benefits to the Homeowners.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did prevent the Homeowners from canceling installation of the aforementioned systems by making token starts on the installation following the signing of the purported contracts but before Homeowners' credit had been approved, which practice was referred to as "spiking."

6. It was a further part of said scheme and artifice to defraud that the defendants would and did induce the Homeowners to sign documents the nature and character of which was falsely represented to and concealed from the Homeowners, to wit, documents styled (1) deeds of trust and (2) promissory notes.

7. It was a further part of said scheme and artifice to defraud that the defendants would and did alter the documents styled deeds of trust and promissory notes by thereafter inserting or causing to be inserted the following:

(a) trustees,

(b) date,

(c) payor,

(d) description of the properties to which said documents would pertain,

(e) principal amounts of indebtedness,

(f) terms of payment,

(g) interest charges, and

(h) late payment charges

without the knowledge, consent, or authority of the Homeowners.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did cause to be certified by a notary public, an officer authorized to take acknowledgement of signatures on instruments which by law may be recorded, that Homeowners personally appeared before a notary public and acknowledged the signatures appearing on the herein mentioned documents styled (1) deeds of trust and (2) promissory notes to be their act and deed.

9. It was a further part of said scheme and artifice to defraud that the defendants would and did cause for their monetary gain the transfer of the herein abovementioned (1) deeds of trust and (2) promissory notes to persons and firms who would purport to be and would masquerade as "holders in due course," and who would collect from the Homeowners monies purportedly due and owing on the deeds of trust and promissory notes.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did knowingly, unlawfully and willfully make and cause to be made false and fraudulent pretenses, promises and representations to Homeowners well knowing at the time that the said pretenses, promises and representations would be and were false when made, including, but not limited to, the false representation that the deeds of trust and promissory notes were mere revisions of and additions to the original contracts.

11. It was a further part of said scheme and artifice to defraud that the defendants would and did, knowingly and willfully, cause to be concealed and did fraudulently conceal from Homeowners the following:

(a) The character and nature of the documents which Homeowners were induced to sign;

(b) Deeds of trust signed by unsuspecting Homeowners would be and were thereafter notarized;

(c) Deeds of trust signed by Homeowners would be and were recorded in the land records of the District of Columbia;

(d) Documents bearing the signatures of Homeowners as thereafter completed would be and were transferred to third parties for money.

12. It was a further part of said scheme and artifice to defraud that the defendants would and did cause certain "congratulatory letters" and token checks to be transmitted to Homeowners for the purpose of and with the intent to lull said Homeowners into inaction concerning the defendants' fraudulent actions and misrepresentations with respect to the chain referrals and the documents styled contracts, deeds of trust, and promissory notes.

13. On or about September 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Alonzo Shearer, 1218 Oates Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 2

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about September 17, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Lawrence Hatton, 408 13th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 3

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about November 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to William Jones, 2701 24th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 4

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 16, 1965, in the District of Columbia, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully did transmit and cause to be transmitted in interstate commerce by means of a wire communication, sounds, to wit, a telephone call between Allied Enterprises, Inc., 4550 Rhode Island Avenue, North Brentwood, Maryland and Allie Mae Asberry, 115 5th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1343 and 2)

COUNT 5

1. The Grand Jury realleges and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 23, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr.,

the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Mrs. George H. Staley, 4643 Minnesota Avenue, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 6

On or about August 9, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Lucille N. Brooks, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 7

On or about August 12, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Alonzo Shearer and Thelma Shearer, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 8

On or about August 20, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rosa Johnson,

knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 9

On or about September 5, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Lawrence Hatton and Edna Hatton, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 10

On or about September 10, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled, "Deed of Trust" and "Promissory Note" bearing the signature Inez Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations of 18 U.S.C. 2314 and 2)

COUNT 11

On or about October 4, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Bettie P. Staley and Sereta S. Staley, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 12

On or about October 26, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rev. Andrew Williams, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 13

On or about October 30, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures William Jones and Evelyn Jones, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 14

On or about December 19, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures James Gray and Marion Gray, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 15

On or about December 21, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful

and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Sherman Webster, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 16

On or about December 23, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Allie Mae Asberry, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 17

On or about December 27, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Samuel Duncan and Alice Duncan, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 18

On or about January 1, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered

securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures George Crutchfield and Ruth Crutchfield, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 19

On or about January 19, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Geneva Gardner, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

____ ____,
Attorney of the United States,
in and for the District of Columbia.

A True Bill:

____ ____,
Foreman.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff*	
v.	Criminal No. 672-70
WILLIAM R. MARION, SR., ET AL. *Defendants*	

MOTION TO DISMISS INDICTMENT FOR FAILURE TO AFFORD SPEEDY TRIAL

The defendant WILLIAM R. MARION, SR., moves to dismiss the indictment for failure to commence prosecution of the alleged offenses charged therein within such time as to afford him his rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States.

For reason therefor, he says:

1. That the indictment charges that defendant engaged in a "scheme and artifice to defraud" from March 15, 1965, through February 6, 1967, but that no event is alleged therein to have occurred after January 19, 1966.

2. That he is informed and believes, and accordingly alleges, that the events charged in the indictment to constitute criminal offenses were the subjects of a series of articles appearing in *The Washington Post* newspaper, a daily newspaper of general circulation in the greater Washington, D. C., Metropolitan area, in October of 1967, and were thus matters of public knowledge as of that time.

3. That, to his best recollection, in the summer of 1968, this defendant voluntarily delivered to Seymour Glanzer, Esq., and Sandor Frankel, Esq., Assistant United States Attorneys for the District of Columbia, at their request, all of the files of Allied Enterprises, Inc., and that said files have at all times thereafter remained in the possession of

the Office of the United States Attorney for the District of Columbia.

4. That, to his best recollection, in the summer of 1968, the defendant voluntarily discussed his activities as an officer of Allied Enterprises, Inc., with the said Seymour Glanzer and Sandor Frankel, Esqs., at their request, and that he fully apprised them of such activities, all of which were, in his opinion, of an entirely innocent nature.

5. That, notwithstanding the foregoing, the Grand Jury herein was not impanelled until September 2, 1969, and defendant was not apprised that the events alleged in the indictment were under consideration by a Grand Jury until advised by counsel that a subpoena had been issued to command his testimony before the same on or about March 16, 1970.

6. That the delay of over five years from the time defendant is first alleged to have commenced the alleged "scheme and artifice" to defraud, of over four years from the time the last event charged in the indictment allegedly occurred, and of nearly three years from the time at which such events became matters of general public knowledge, to the time of filing of the indictment herein, is an unreasonably oppressive and unjustifiable time after the alleged offenses.

7. That the indictment charges defendant with numerous general misrepresentations allegedly made to divers persons, on dates unspecified; with numerous instances of telephone and postal communication of a nature undescribed; and with numerous instances of interstate transportation of securities allegedly false, forged, and altered in respects unknown, over a period of approximately 23 months more than three years past; and, further, that the indictment charges defendant as both principal and aider and abetter as to each.

8. That it is unreasonable and oppressive, and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, to require the defendant to answer and defend against charges of stale offenses, under circumstances requiring precise memory of events long past, and the production of evidence, both testimonial

and documentary, which may have become unavailable by the passage of time.

JACKSON, GRAY & LASKEY.
By /s/ *T. P. Jackson*
Thomas Penfield Jackson

By /s/ *James P. Schaller*
James P. Schaller
1828 L Street, N. W.
Washington, D. C. 20036
466-8850
Attorneys for Defendant Marion

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss Indictment for Failure to Afford Speedy Trial was mailed, postage prepaid, this 5th day of May, 1970, to Sandor Frankel, Esq., Assistant United States Attorney, Room 3136-C, United States Courthouse, Third and Constitution Avenue, N. W., Washington, D. C. 20001.

/s/ *James P. Schaller*
James P. Schaller

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff* v. WILLIAM R. MARION, SR., ET AL. *Defendants*	Criminal No. 672-70

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT MARION'S MOTION TO DISMISS INDICTMENT FOR FAILURE TO AFFORD SPEEDY TRIAL

The development of the case law in this connection tends to indicate that the Sixth Amendment guarantee seeks to provide a safeguard (1) to limit the possibilities that long delay will impair the ability of an accused to defend himself; (2) to prevent undue and oppressive incarceration prior to trial; and (3) to minimize anxiety and concern accompanying public accusation. Two of these three guarantees preponderate in the consideration of the Sixth Amendment relevant to the instant case.

As early as 1956, the United States Court of Appeals for the District of Columbia Circuit held unequivocally in the case of *Taylor v. United States,* 99 U. S. App. D. C. 183, 238 F. 2d 259, that failure to bring a defendant to trial until that year for crimes allegedly committed in 1950, was denial of his constitutional right to a speedy trial and required reversal, even though the delay was caused by imprisonment of defendant for another offense in absence of a showing of a reasonable effort by the Government to obtain the defendant's return to the local jurisdiction.

In *Ross v. United States,* 121 U.S.App.D.C. 233, 349 F. 2d 210 (1965) in a *per curiam* reversal of a narcotics violation conviction on grounds of denial of Due Process because defendant was unable to defend himself, where the Complaint against him was not sworn out until seven months after the alleged offense and, apart from the narcotics, the prosecution's case consisted solely of the testimony of a

single policeman, who had to refresh his memory from a notebook (and where defendant was unable to recall the events of the day of the offense), the Court found that the record did not support the Trial Court's conclusion of no showing that the witnesses' memories were impaired by the delay.

> "The record before us is, thus, one which shows (1) a purposeful delay of seven months between offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook." *Ross v. United States, supra,* 121 U.S.App.D.C. at 238, 349 F. 2d at .

One week prior to the decision in *Ross,* Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit had held, in the case of *Hanrahan v. United States,* 121 U. S. App. D. C. 134, 348 F. 2d 363, that:

> "In some cases, where the delay is uncommonly long and, therefore, the likelihood of prejudice quite high, the reason for the delay may be of little significance." *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 138, 348 F. 2d at 367.

Judge Wright indicated that two questions were of primary importance.

> ". . . First, did the prosecutor exercise reasonable diligence in seeking . . . indictment?
>
> * * *
>
> "[Was] . . . the prosecution conducted with such disregard of appellant's interests that it can be said that the delay resulted from deliberate, *or at least negligent,* actions on the part of the prosecutor . . . ?" *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 139, 348 F. 2d at 367-368.

If so, then, unless the prosecutor can show that the accused suffered no serious prejudice "beyond that which ensued from the ordinary and inevitable delay," the Court concluded ". . . appellant's Sixth Amendment rights have been denied and the conviction must be vacated and the

indictments dismissed." *Hanrahan v. United States, supra,* 121 U. S. App. D. C. at 139, 348 F. 2d at 368.

On remand, the District Court, per Sirica, J., at 255 F. Supp. 957, (D.C.D.C., 1966) held that the delays were not caused by arbitrary, capricious, vexatious, oppressive, deliberate or negligent conduct on the part of the Government and that *defendants suffered no serious prejudice* as a result of the delays which did not ensue from the ordinary and inevitable delay.

The District Court did not refer to the opinion of the Supreme Court in the case of *United States v. Ewell,* 383 U. S. 116, 15 L. Ed. 2d 627, 86 S. Ct. 773 (1966), but reflected the approach taken therein by requiring some showing of (1) prejudice to the defendant; (2) capriciousness, purposiveness, vexatiousness, etc. on the part of the prosecutor; (3) negligence on the part of the prosecutor.

Also in 1966, the Tenth Circuit Court of Appeals in the case of *Hampton v. State of Oklahoma,* 368 F. 2d 9, reiterated (1) that mere passage of time does not establish an unconstitutional delay of speedy trial or due process and (2) that the right to speedy trial is relative and must be determined in light of circumstances. More significantly, the Court held that a defendant cannot "sit by without effort to obtain an earlier trial or himself contribute to the delay and thereafter be heard to complain."

Nevertheless, the Court in *Hampton,* felt that enough appeared, "considering the application as a whole," to require an examination of the circumstances at an evidentiary hearing and the making of findings of fact and, therefore, reversed a judgment denying appellant's application for writ of habeas corpus without an evidentiary hearing.

In *Mathies v. United States,* 126 U. S. App. D. C. 98, 374 F. 2d 312 (1967), then-Circuit Judge Burger held that a speedy trial claim is waived unless the right is asserted promptly, the appellant in that case having failed to move to dismiss the indictment for unnecessary delay under Rule 48(b), Federal Rules of Criminal Procedure, which, according to the Court, ". . . places a greater requirement of speed on the prosecution, and permits dismissal of an indictment, even though there has been no constitutional violation." [citing *Mann v. United States,* 113 U. S. App. D. C. 27, 30-31, 304 F. 2d 394, 398].

Judge Burger also found that the lapse of four and one-half months between defendant's arrest and return of the indictment was not, *per se*, sufficient grounds upon which to grant appellant's motion to dismiss the indictment, because appellant had made no showing of unnecessary delay and did not claim prejudice as a result of the delay, unlike the situation in the instant case. Accord: *Fleming v. United States*, 378 F. 2d 502 (1st Cir. 1967).

In *Harrison v. United States*, 128 U. S. App. D. C. 245, 387 F. 2d 203 (1967), the Court, per Robinson, J., held that a six-year lapse between an alleged homicide and the *third* murder trial of defendant was not, upon consideration of all attending circumstances, including an interval of two years in which an appeal from the second trial was pending because of the decision first, by a panel of the Court of Appeals and then, a decision by the entire Court, a purposeful or oppressive delay such as to violate the constitutional guarantee of the right to speedy trial.

> ". . . In determining whether the delay complained of assumes Constitutional proportions, we examine the circumstances closely, to ascertain whether it was 'arbitrary, purposeful, oppressive or vexatious.'" *Harrison v. United States, supra*, 128 U. S. App. D. C. at 249, 387 F. 2d at 207.

Additionally, the Court in *Harrison*, was "unable to identify any harm to appellants consequent upon the passage of time." *Harrison v. United States, supra*, 128 U. S. App. D. C. at 250, 387 F. 2d at 208.

In *Klopfer v. North Carolina*, 386 U. S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967), the case which incorporated the Sixth Amendment into the Fourteenth Amendment and thus made it binding upon the several States, Chief Justice Warren held for the Court that even though the defendant was free on bond and thus permitted to go "whithersoever he will", a State Court's entry, over defendant's objection, of a *nolle prosequi*, with leave to reinstate at a future date a prosecution for trespass committed by participation in a Civil Rights demonstration in a restaurant, violates "by indefinitely prolonging the oppressive effects of the pendency of the indictment . . . as well as prolong[ing] the anxiety and concern accompanying public accusation . . ." defendant's Sixth Amendment right to a speedy trial.

Wilkins v. United States, 129 U. S. App. D. C. 397, 395 F. 2d 620 ( ) and *Harling v. United States*, 130 U. S. App. D. C. 327, 401 F. 2d 392 (1968), appear, at first blush, to be somewhat at odds with the philosophy of *Klopfer*, but only to the extent that it has been held the policy of the Court to grant preference to cases in which a defendant was incarcerated pending trial and to the extent that there was no claim that the defense was impaired or proof lost and the Government's case was "exceptionally strong." But see *Blunt v. United States*, 131 U. S. App. D. C. 306, 404 F. 2d 1283 (1968), where Chief Judge Bazelon held that the likelihood or even the "reasonable possibility" that the defendant has been prejudiced by the alleged delay is "a factor to be considered in whether there has been a denial of a speedy trial." But in *Blunt*, the Court found the cause of the delay to have been the deliberate pace of a system of safeguards designed to protect the accused, and so indicated that it would be reluctant to find a Constitutional infirmity in even cases involving very long delays. Similarly, in *Sims v. United States*, 132 U. S. App. D. C. 111, 405 F. 2d 1381 (1968), where the circumstances included determination of numerous and varied pre-trial issues raised by the defendants themselves, a sixteen-month delay between arrest and joint trial of several defendants was held no denial of the right to a speedy trial.

The most interesting recent case on this issue is *Smith v. United States*, U. S. App. D. C., , 418 F. 2d 1120 (1969). There, the Court found that an unexplained delay of 13 months between arrest and trial—no part of which could be attributed to the conduct of appellant or his counsel—shifts to the prosecution "a heavy burden of showing that there was no prejudice to the defense." *Id*, 418 F. 2d at 1122-1123. Oddly enough, while finding unequivocally that the prosecution failed utterly to meet this burden, the Court nevertheless retreated from adopting a rule that would require dismissal of the indictment, largely on the grounds (1) that appellant failed to make out even a *prima facie* case of prejudice and (2) that the delay was primarily attributable to the "unusual strain upon prosecutorial and judicial resources" which exists at present and

> ". . . [t]he legislature ha[ving] been apprised of the problem . . . we may appropriately accommodate our

> doctrines to permit fine for provision of resources necessary to dispose of criminal cases without denial of fundamental right.'' *Id*, 418 F. 2d at 1122.

In what is probably a harbinger of the next step in the development of this Speedy Trial doctrine in this jurisdiction, Judge J. Skelly Wright contended that owing to the fundamental nature of the right, the question of whether the fault for a delay lies with the calendar system or with the prosecution is irrelevant, that while ''recogniz[ing] that the appellate remedy for denial of a speedy trial is a drastic one'' and that ''[n]ormally, the allocation of public resources is not the concern of the judiciary,'' nevertheless ''where . . . such a misallocation leads to the almost blind and mechanical obliteration of a fundamental guarantee against oppression, the drastic remedy is . . . called for.'' *Id.*, 418 F. 2d at 1126.

The only additional factor to be considered, according to Judge Wright's analysis is ''the diligence of the accused in seeking a speedy trial''—a factor which can be ''taken seriously'' only if, as here, the defendant is free pending trial. But that factor is of little or no weight here because it cannot be said that the defendant has not made a serious and conscientious effort to procure a speedy trial in light of the fact that his records were made available voluntarily —and in their entirety—to the United States Attorney's Office many months ago.

It is difficult to see how it could be argued that defendant's ability to defend himself has not been impaired. Along with the only-to-be-expected impairments flowing naturally from a delay of such duration, there is the additional fact that during all that time, all of defendant's records bearing in any way upon the transactions complained of have been in the custody of the prosecution and unavailable to the defense.

Given these circumstances, it cannot but be presumed that the delay in the instant case is the result most likely of purposeful, vexatious and oppressive intent by the Government or at the very least of negligence and indifference to

defendant's rights rising to the level of a denial of Due Process.

Respectfully submitted,
JACKSON, GRAY & LASKEY
By /s/ *T. P. Jackson*
Thomas Penfield Jackson

By /s/ *James P. Schaller*
James P. Schaller
1828 L Street, N. W.
Washington, D. C. 20036
Attorneys for Defendant Marion

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Points and Authorities in Support of Defendant Marion's Motion to Dismiss Indictment for Failure to Afford Speedy Trial was mailed, postage prepaid, to Sandor Frankel, Esq., Ass. U. S. Attorney, Room 3136-C, U. S. Courthouse, Third and Constitution Avenue, N. W., Washington, D. C. 20001.

/s/ *James P. Schaller*
James P. Schaller

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA vs. WILLIAM R. MARION AND SAMUEL C. CRATCH, *Defendants.*	Crim. No. 672-70

Washington, D. C.
Monday, June 8, 1970

The above-styled cause came on before THE HONORABLE GEORGE L. HART, JR., United States District Judge, at 11:00 o'clock a.m.

APPEARANCES:

On behalf of the Government:
SANDOR FRANKEL,
Asst. U. S. Attorney.
On behalf of Deft. Marion:
THOMAS P. JACKSON, Esq.
On behalf of Deft. Cratch:
BEN COTTEN, Esq.

* * * *

[2] PROCEEDINGS

The Deputy Clerk: Case of United States versus William R. Marion and Samuel C. Cratch, Criminal No. 672-70.

The Court: All right, gentlemen. Where do we stand in this matter?

Mr. Jackson: May it please the Court: Thomas P. Jackson. I represent the defendant William R. Marion, Sr. I understand there are several motions on for hearing this morning.

The Court: All right.

Mr. Jackson: And I assume you also would like to have a status report from both sides.

The Court: Yes.

Mr. Jackson: I believe in chronological order the first motion before Your Honor is the motion of the Defendant Marion to dismiss for failure to afford him a speedy trial. And the authorities bearing on the subject both in favor of the Government and in favor of the defendant I think are adequately treated in the memoranda filed by both sides. The facts specifically are as follows: This indictment charges the defendant William R. Marion as a principal of a corporation known as Allied Enterprises, Inc., with making false and fraudulent representations to a class of persons known as homeowners in the District of Columbia.

The indictment charges that the events which comprise [3] the substance of the charges against him occurred from March 15, 1965 to February 6, 1967. The last act, however, specifically charged in the indictment is January 19, 1966, which is count 19 of the indictment, no later date is mentioned in the indictment.

The February 6th date, February 6, 1967 date is in all likelihood the date on which the Federal Trade Commission issued a cease and desist order against Allied Enterprises and these two defendants, and directed them to discontinue the practices which comprise the substance of the indictment, and as of that date no further activities took place. As a matter of fact, they had ceased business substantially before then. And so the dates with which we are primarily concerned are the dates of March 15, 1965 through January 19, 1966.

We submit that this is an unconscionable period of time within which to defer criminal prosecution of someone for a business-type crime, particularly considering the notoriety with which the activities of this corporation, among others, became known in the District of Columbia.

Now, Your Honor should have before you a pleading entitled Exhibits A through N of the Defendant Marion's motion to dismiss the indictment, which constitute the newspaper articles relative to this particular crime. I think it would help if Your Honor would find those, they should be in the file.

[4] The Court: I have seen them somewhere, but I don't see them now. Have you copies of them there?

Mr. Jackson: I have, but my copies are illegible because they are white on black photostats and we copied them on the Xerox machine. They were filed on Thursday of last week.

The Court: Well, that is why I do not have them. It takes two or three weeks for things to filter around to me.

Mr. Jackson: Well, I have excerpts from the articles to which I will refer and perhaps Your Honor can look at them yourself at the conclusion of the hearing this morning.

The point is that this is a crime—or the crimes charged here are matters which were of intense public knowledge, general public knowledge, from October of 1967.

The Court: Haven't there been several suits filed in this court on it?

Mr. Jackson: Yes, there have been. The one with which I am familiar now is a civil class action now pending by three named plaintiffs against these defendants and Allied Enterprises, and a number of other entities mentioned in those newspaper articles, Atlas Credit Corporation, and so on, the gist of which is to cancel promissory notes and deeds of trust.

The Court: Isn't that before me?

Mr. Jackson: I don't know, Your Honor.

The Court: It seems like I have one like it anyway.

[5] Mr. Jackson: I can give Your Honor the civil number. It is 2451-68, and our case file does not reflect whether or not that case has in fact been assigned to you.

In any event, the events charged here took place from March of 1965 through January of 1966. In early February of 1967, the Federal Trade Commission considered, deliberated upon and issued a cease and desist order in this matter.

In October of 1967 the Washington Post, after a lengthy investigation by its reporters, it says, dealt in extreme detail with what they regarded as fraudulent or illegal second mortgage practices in the District of Columbia, and were in virtually daily contact with the U. S. Attorney's office about it, and the indictment in this case was not returned until April of 1970.

When Your Honor examines the articles to which we have referred and are contained or have been filed as ex-

hibits to the motion, you will discover that about the time that these articles were appearing the 1967 World Series was in progress and to illustrate the difficulty of defending oneself against a charge this stale, consider if you will the difficulty in remembering who the participants in the 1967 World Series were and what was the outcome of that series, much less of what took place at any game.

The Court: It's good you asked me that instead of Judge Fahy.

[6] Mr. Jackson: I would like to call Your Honor's attention to specific provisions in these articles. The first article appeared in the Washington Post on Saturday, September 30, 1967.

By the way, Mr. Frankel has been good enough to say that I may represent to the Court that we stipulate to the authenticity of these particular articles.

The series began on September 30, 1967 on page A-1, Washington Post, first column, and in paragraph 4 it says:

> "The home improvement companies who obtained the mortgages—and the creditors who bought and are now collecting on them—are being investigated by United States Postal Inspectors, the Federal Housing Authority, the Federal Trade Commission and the Department of Justice."

In paragraph 6, sub-head "indictments expected:"

> "In the wake of this newspaper's investigation, U. S. Attorney David G. Bress said he expected indictments in the cases here within two weeks."

Page A-6, column 1, third full paragraph says:

> "The United States's Attorney's office here first began receiving complaints about some of these firms [7] more than two years ago. Two isolated indictments—charging the officers of one firm with forgery and the notary public for another with false notarization—were handed down early this year."

In the fifth full paragraph it says:

> "On March 30, Federal investigators sent United States Attorney Bress a lengthy report on the activities of one firm. The report also contained a strong indication that there were many other firms in the District engaged in similar schemes."

Under a sub-head, "Fraud Squad set up," it says:

"In July, after the Washington Post investigation began at the courthouse, Bress decided to set up a special fraud squad in his office to work on the case 'because of the voluminous nature of the investigation.' "

"Bress said this week that the fraud charges are 'not the crimes of violence that I am now primarily interested in, of course, but it is the kind of illegal conduct we will look into.' "

It continues in column 2:

[8] "Two Federal agencies, the Federal Trade Commission and the Department of Justice are looking into Atlas' activities in a number of cities including Washington."

Atlas Credit Corporation is alleged to be one of the purchasers of the second trust notes.

It was again treated on October 1st, 1967, again on page A-7 on Monday October 2nd there was another article dealing with another firm. On Wednesday, October 4th they dealt specifically with Allied Enterprises and Mr. Marion and Mr. Cratch. And on the first page of the Washington Post, paragraph 3, it says that the purchaser whose photograph appeared on the front page of the paper——

"She is one of scores of customers of six local firms who sold intercoms and water softeners during the past five years and whose sales practices are now under investigation by Federal authorities."

Paragraph 8:

"The six firms are among a dozen under investigation by local and Federal authorities for their second-mortgage practices."

Page A-8, column 4, sixth full paragraph:

"But a Federal Trade Commission examiner found [9] earlier this year that 'few, if any' of Allied's customers received 'enough referral commissions to obtain their intercom at little or no cost.' "

Which is precisely the allegation made in the indictment against these defendants.

The Federal Trade Commission report which was issued and published on February 6, 1967 is appended to the list of exhibits which we have submitted to Your Honor as Exhibit A.

In the Washington Post on Thursday, October 5th, 1967, on page A-18, column 3, the first full paragraph again, it referred to the fact that all of these companies were under investigation by Federal authorities.

On Sunday, October 8, page A-14, column 2, the ninth full paragraph, it says:

> "U. S. Attorney David G. Bress began an intensive investigation into the practices of a dozen home improvement firms here in the wake of the four-month investigation by the Washington Post.
>
> "U. S. Postal Inspectors and the Federal Trade Commission are also investigating these firms. But Bress's two-month old "fraud squad" consists of a single assistant U. S. Attorney and another man on loan from the Department of Justice. No special U. S. [10] Grand Jury has been called to investigate."

That was on Sunday.

On Wednesday, October 11, page A-1, column 5, paragraph 4, it says:

> "Meanwhile, the U. S. Attorney's office announced that a special grand jury, which was sworn in Monday, will conduct its own investigation of the second-mortgage schemes. It will sift information now being gathered by Federal investigators and prosecutors."

It continues on page A-4, first full paragraph:

> "The special U. S. grand jury will divide its time between the local second-mortgage disclosures and an unrelated investigation of the financial affairs of Representative Adam Clayton Powell.
>
> "Assistant U. S. Attorney Seymour Glanzer and Justice Department attorney John R. Risher, Jr., a specialist on frauds, will present the evidence on second mortgage schemes to the grand jury.
>
> "Glanzer and Risher were assigned by U. S. Attorney David G. Bress to staff a special 'fraud investi- [11] gation team' in July after reporters began their own investigation of the second mortgage practices.
>
> "When last week's series of articles began, Bress relieved Glanzer of other duties to concentrate on the fraud investigation. He had also been carrying a normal prosecutor's caseload up to then.
>
> "According to Alfred Hantman, Bress's chief assist-

ant, the investigation is intended to go beyond the salesmen and other lower-echelon employees of the suspected firms who have usually been the only ones indicted in the past in similar investigations here and elsewhere."

The Court: I may say that this occurred during a period when I was trying to get the Department of Justice to give more U. S. Attorneys, Assistant U. S. Attorneys to this jurisdiction, and Mr. Bress said he didn't need any.

Mr. Jackson: I recall something about that, Your Honor.

In any event, not later than October, 1967, the U. S. Attorney was saying—he was quoted as saying he expected indictments within two weeks, he had set up a special fraud [12] squad to deal with this problem, he assigned somebody specially to head the fraud squad and he relieved him of other duties and there was a Justice Department specialist working on the project with them and that a grand jury had been convened to hear the evidence necessary to return an indictment.

The grand jury which actually returned this indictment was sworn in on September 2, 1969, not 1967, and it returned its indictment in April of 1970.

Now, a physiological fact of which I am sure Your Honor could take judicial notice is that memories attenuate as to what transpired, and they particularly attenuate as to any ordinary business transactions, the usual routine course of one's business over a period of time.

The Court: I am not sure these alleged activities are business transactions, but——

Mr. Jackson: Well, whether they constitute the crimes of which they are charged, of course, is the issue of law to be tried in this particular case. The fact remains, however, that Allied Enterprises was in the business at the time of selling and installing home intercom systems in a number of homes in the District of Columbia.

It will probably be revealed that what transpired in these particular cases didn't differ materially from what took place in most cases, the general routine operation of the [13] business which the Federal Trade Commission didn't seem to like, was conducted in much the manner that is alleged here.

The Court: I hope that is not routine business practice. If it is, it ought to be stopped.

Mr. Jackson: Perhaps it ought to be.

The Court: Assuming the allegations are true—not assuming, but if we would for the purpose of argument consider it true, then this is a terrible way to run a business.

Mr. Jackson: It undoubtedly is not the most respectable business practice, there is no question about that. Whether or not it constitutes a crime, or what was actually done—let's put it that way—I am quite sure as the evidence emerges it will not be shown to be, the evidence will not show that what was alleged in the indictment was done in precisely that form, although there will be no dispute as to the fact that there was a sales referral plan and that people were signing notes and gave deeds of trust to secure payment of the contract.

The Court: Dean, call down and ask if 2451-68 isn't a case assigned to me.

Mr. Jackson: The cases that deal with the question of whether or not or what constitutes a speedy trial and in what circumstances a speedy trial has been denied or not denied or when it will constitute grounds for dismissal of an indictment are sufficiently numerous in this jurisdiction so [14] that we really don't need to look elsewhere to determine what the law is with respect to it. Suffice it to say that our Court of Appeals has considered that question in a number of instances, and have expressed themselves in a number of instances as critical of the practice of delaying the business of calling one to answer a charge of a crime for an unsconscionable period of time and in some instances merely the exigencies of investigation or of the allocation of judicial resources coupled with the failure to show actual prejudice has been found not to warrant dismissal of the indictment.

Nevertheless, under the circumstances of this case—and this case I think is unique on its circumstances—perhaps the closest case in analogy is the Taylor case in 1956 which is cited in our memoranda, and in that case the delay was between the alleged commission of the crime and the return of the indictment, and in that case Judges Edgerton, Danaher and Bastian reversed a conviction and specifically on the grounds of a failure to afford a speedy trial and they

did not require in that case any specific showing of actual prejudice. As a matter of fact, the Court said that the long delay "certainly prevented him or his attorney from preparing a proper defense."

This was a delay of roughly the same period of time we have involved here. And that the defendant's imprisonment [15] in another jurisdiction and his own failure to insist upon a trial did not waive his right to a speedy trial. The Court said the long lapse of time between the commission of the offense and the trial and the incarceration of the appellant throughout the entire interim and resulting handicap of it or any other defense must certainly have handicapped the preparation of the defense. That is a quotation from page 262 of 238 F2.

I am sure Your Honor is also familiar with the case of Ross, 1963, which some people have said applies only to narcotics situations, but the rationale of Ross does not limit itself to narcotics cases. The rationale relates to the difficulty of remembering specifics of transactions which took place over a long period of time or which took place a long time ago, in which the Government is aided by a memory refreshing recollection, recorded past recollection, and the defendant has no such memory device.

In conclusion we would submit that the intense notoriety that the activities of these particular companies enjoyed, if you will, in October of 1967, and the specific knowledge of the U. S. Attorney's office and the concern of the U. S. Attorney's office with what took place, and the repeated suggestions that indictments were expected momentarily, and that special teams had been assigned to investigate and [16] prosecute, do not permit the Government to wait until March of 1970 or April of 1970 to ask somebody to defend himself against crimes that were alleged to have occurred over a period of twenty-four months, nearly five years ago.

The Court: All right, counsel.

Mr. Cotten: Your Honor, I am Mr. Cotten representing Mr. Cratch, and I have adopted both by praecipe and orally previously the various motions filed on behalf of Mr. Marion inasmuch as I feel they apply as fully and appropriately to Mr. Cratch as they would to Mr. Marion.

I would address myself to one other point in connection with this. The Government in its opposition to the written

motion attempts to point out that there was a distinction made between a post-arrest delay and a pre-arrest delay. As a matter of fact, it cites in its brief the case of U. S. versus Fineberg, 383 F 2 page 60, a 1967 case.

A perusal of that case, Your Honor, brings forth the points that support our motion. I would just emphasize that rather than attempt anything that would be repetitive, in that case it is set forth that pre-arrest delay, page 64, Your Honor, is usually free of the sometimes damaging effect of any excessive post-arrest delay because one does not have the burden of having been publicly accused.

Of course, in this case, where the facts were presented [17] very ably by Mr. Jackson, we contend there has been a public accusation.

Further, on page 651 it sets forth the fact that itself a pre-arrest delay may very well impair the capacity of the accused to defend himself, and it sets forth therein in the following paragraphs numerous areas into which the court must inquire, not only the memory Mr. Jackson referred to, but with specific reference to the witnesses who may now be unavailable, some of the other references it makes as a matter of fact refer to the Powell versus U. S. 122 U. S. Court of Appeals, page 229, and they feel that there are a series of areas that have to be inquired into, and along this same refutation, if you will, the Government's position I would add, when he attempts to distinguish the cases of Taylor and Ross on the grounds that it was a specific memory or that it had to do with the facts that they were unable to recall a specific event, I would simply refer to the fact that here we are being accused or standing accused of a variety of events greater than specifics in detail to any other Taylor or Ross case. Therefore, it would be more appropriate than less appropriate.

The Court: Do I also understand that the records of the defendants have been in the hands of the U. S. Attorney since the summer of 1968 and not available to the defendant?

Mr. Jackson: That is correct, Your Honor, Mr. Marion, [18] to his best recollection, says that those records were transferred to the U. S. Attorney's office in the summer of 1968. I must point out to Your Honor in his opposition to our motion to dismiss, Mr. Frankel indicates two specific

dates in 1969 on which he thinks those records were delivered. Whenever it was, it was not later than early 1969 and it was according to the defendant's recollection, the summer of 1968, and that on the occasion in which he did bring those records in or made them available he freely discussed the matter with the U. S. Attorney's office and explained to them what his transaction was and to his knowledge he was not at least before the Federal Trade Commission pleadings aware of the fact that he was proceeding unlawfully and those records have been in the Government's possession that period of time.

The Court: All right.

Mr. Frankel: Good morning, Your Honor.

As the Government understands the rule of law that is applicable to this case, Your Honor, a motion to dismiss for failure to afford speedy trial based on the time interval between the date of the alleged offense and the date of the indictment does not lie in the absence of a showing by the defense of some prejudice. That is the rule as we understand it. That has been adopted by every Federal circuit that has spoken on the issue, including the Court of Appeals for this circuit, the Second, Fifth, Sixth, Seventh, Eighth, [19] Ninth and Tenth Circuits, on the basis of the cases we have submitted to Your Honor.

The Court: Of course, the very nature of the thing might infer prejudice in a given case.

Mr. Frankel: Your Honor, it could conceivably be a different situation if at time of trial there is some showing of prejudice. But in the cases that we have been able to find, that has not been the case.

The Court of Appeals for this circuit in its two most recent pronouncements in cases one of which was decided after we submitted our motion, has stated in the case of Troy V. Post against U. S., Criminal No. 208-61, decided October 15, 1968 by a panel of the Court of Appeals for this circuit in footnote 3 I now quote from the opinion interprets the Tynan case as requiring "prejudice, a condition, the record negates relating from the delay."

Now, it may be at some future time the record will suggest some prejudice, I don't see how it can, but at this point, at any rate, it does not, at this stage of the proceedings.

In the most recent occasion, issue came to the attention of the Court of Appeals, the Orsinger opinion, U. S. No. 22756 decided June 3, 1970 by the Court of Appeals for this [20] circuit, a five-year delay between the date of the alleged offense and the date of the indictment did not provide the grounds for a motion to dismiss for failure to afford a speedy trial in the absence of some prejudice. That was a five-year delay, Your Honor.

The Court: In that case, I don't think the facts were known at the beginning, were they?

Mr. Frankel: That is not clear from the opinion, and I don't know from my personal knowledge, Your Honor.

But there has been no case that we have been able to find that has been suggested to us by the defense which suggests this kind of a motion is an appropriate one in the absence of some showing of prejudice, and if that is the rule of law that we are to follow, then the Court's attention I think should be focused on what areas of prejudice have been suggested to the Court.

The only suggestions are rather vague ones, none have been suggested during oral argument beyond the generalized notion that memories weaken over a period of time. That is the reason for the Ross opinion, that is the reason for the Taylor opinion, but the Court has said in Taylor "we do not rely on the mere passage of time between the commission of the offense and the date of indictment for that is governed by the statute of limitations."

[21] They found prejudice in Taylor. The prejudice was that an individual had to recall a specific act on a specific day and his activities on that day he is alleged to have committed housebreaking and robbery.

In this case the defendants are called upon to account for their actions over a more prolonged period of time dealing with their general business practices as officers and employees of Allied Enterprises.

The Court: Let's take count 4, for example. There the defendants are called upon to respond to an allegation of a telephone call made on December 16, 1965, almost five years ago. How are the defendants going to respond to that?

Mr. Frankel: Your Honor, the way that that particular aspect of this particular count would be proved would be

through the mouth of the person who supposedly received this telephone call, and the defendants would be expected to know that their customers, the homeowners in this case, were contacted either by door to door solicitation or by telephone calls.

If there were any specific actions, Your Honor, that they are called upon to account for in this indictment, or that they are called upon to remember during the course of this trial, and if they have honestly got to say I don't remember, at that stage it might be appropriate for the Court to consider whether they have been so severely prejudiced by the [22] passage of time as to warrant at that time a dismissal of the indictment. But at this stage all the defense is claiming is that on page 3 of their motion to dismiss the production of evidence both testimonial and documentary may have become unavailable by the passage of time. There is not even a specific allegation that it in fact has.

There is no suggestion, Your Honor, of the nature of this evidence, the nature of the testimony, the witnesses who have become unavailable as in fact where the Tynan case documentary evidence was destroyed previous to the indictment in that case. The Court of Appeals nevertheless ruled that was not sufficient prejudice. Here there is not even a claim that testimony or documents have become unavailable, merely the suggestion that they may have.

The allegation that documentary evidence has become unavailable is really belied by a subsequent allegation of prejudice at page 7 of the memorandum in support of defendant's motion to dismiss where the defendant alleges during the interval between either the summer of 1968 or as we suggested January of 1969 all the defendant's records bearing in any way upon the transactions complained of have been in the custody of the U. S. Attorney's office and available to the defense.

In the first instance if those documents have been in our possession, Your Honor, if all documents relevant to their [23] conduct, to Defendant Marion's conduct of the business has been in our possession, it is difficult to see how those have become unavailable. The Government has never suggested to the defense they don't have total right to inspect all those documents.

The Court: Well, tell me this: Why, why was this infor-

mation in the hands of the U. S. Attorney in 1967? Why was not some action taken on this until April, 1970? I guess it is really an unfair question to ask you, since we have a new U. S. Attorney and new assistants since then, but still it is a puzzling situation.

I remember this thing back in 1967, and I remember how outraged I was by the reports in the paper of these poor people who were being—if one could believe the reports—terribly victimized by these outrageous business practices, and yet nothing is done about it for three years. I frankly don't understand it.

Mr. Frankel: Let me say first, Your Honor, although I have agreed as Mr. Jackson points out to the Court, I have stipulated to the authenticity of the documents that have been filed with the Court, I am not in a position to accept or reject the substantive allegations of those articles. But even assuming them to be true for purposes of this hearing, Your Honor, in the first instance I can only report to the Court what has been reported to me as to the reasons for [24] the delay. I was not an assistant U. S. Attorney at the time of these newspaper articles. I can only tell the Court that it has been represented to me that the U. S. Attorney's office at the time was not sufficiently staffed to proceed as expeditiously as Your Honor might have liked for us to proceed.

The Court: I know quite well it wasn't well staffed, and I quite well remember asking Mr. Fred Vinson, the assistant to the Attorney General, to come over to my office and discuss the matter, and having Mr. Bress say to Mr. Vinson when I told him the office was horribly understaffed that he didn't need any more help.

Mr. Frankel: Your Honor, all I can do is represent to the Court what has been represented to me. If those were the representations made to Your Honor, there is no way I can respond to that fact.

The Court: I guess there isn't.

Mr. Frankel: All I can tell Your Honor is that in fact it has been represented to me as a fact that the man in charge of the prosecution of fraud cases in the District of Columbia for the U. S. Attorney's office was at that time unable because of his heavy caseload and the heavy caseload of the office otherwise, the case could not be shipped out to

handle this case at the time of the articles that are brought [25] to the attention of the Court.

But let me suggest to the Court furthermore, even if these manpower problems did not at that time exist, the standard as we understand it to be applied by Your Honor in determining this motion is whether at this juncture of the proceedings there has been any evidence of prejudice anticipated by the defense.

The cases that we have cited, the Feinberg case referred to by Mr. Jackson, there was a five-year statute of limitations in that case. The indictment was not brought until four years and eleven months had transpired from the date of the offense to the date of the indictment.

In the Tynan case there was a several-year delay and the Tynan case itself distinguished the Ross case by suggesting in the case where you have a kind of mail fraud or scheme involved which covers a more protracted period of time than one simple sale of narcotics covers, then the prejudice you can reasonably anticipate is of a different nature and in fact is more difficult to anticipate and is something one would not expect to anticipate as easily as you would expect to anticipate the difficulty of a narcotics seller recalling one specific day seven months earlier which he has no reason to remember.

The Court: Well, it might be a lot easier to remember a [26] single transaction or a single day seven months ago than to remember something over four years later, four to five years later, remembering 19 specific transactions.

Mr. Frankel: If I may respond, Your Honor, as we suggest in our memorandum, the nature of the Government's evidence in this case is largely documentary and is largely based on the general practices of people, the defendants and their associations with Allied Enterprises. We are not expecting them and they are not called upon to recall specific instances divorced in nature in any significant degree from the rest of their dealings with Allied Enterprises.

This was a business, Your Honor, that was carried on for over a year. It was not a specific isolated incident. It may be that at some later stage of the proceedings, either at trial or after trial, or at sometime before trial, the defense could suggest to the Court exactly how they have been prejudiced, which witnesses they now claim may have be-

come unavailable, the memories of the witnesses at the time of trial have become so withered as to warrant this Court's setting aside the indictment, what documents have been lost. In fact, no documents have been lost. On the basis of the allegations of the defendants' motion themselves, it claims all the documents still exist in the U. S. Attorney's office.

The fact that there was a proceeding brought before [27] the FTC, the fact that there has been since 1968 a civil action pending in this case in which the Defendant Marion has been represented by the counsel that he has been so ably represented by in this matter suggests that he has been put on notice that he has every reason to have remembered his dealings with Allied Enterprises and not to have let business dealings of over a year suddenly those business dealings evaporate from his memory.

In brief, Your Honor, without being repetitious, if at some stage of the proceedings the defense can suggest to the Court what prejudice has been shown them, then the motion could conceivably lie or at least could conceivably be re-argued, but at this stage with no showing of prejudice whatsoever, Your Honor, I think the motion should be denied.

Mr. Jackson: As Mr. Frankel has suggested at several points, he seems to think there must be some showing of specific prejudice at this point in order to warrant a dismissal of this indictment, and I submit that the general prejudice which flows from the attenuation of human memories is apparent in this case and need be on the basis of the Taylor case no further elaborated to warrant a dismissal of the indictment.

Actually, he is saying we will dismiss when you can show or it's possible to dismiss when you have shown specific prejudice or inability to remember something, but not before, and this places the defendant on the horns of an [28] impossible dilemma.

If the defendant is called to answer a question, Mr. Marion, did you have a telephone conversation with Mr. so and so on December 15, 1965, if he answers that question truthfully and says I just don't remember, then of course the proponent of whatever transpired in the course of that telephone conversation is believed. He has not refuted

anything which was said by the other party to the conversation, tending to incriminate him.

If, on the other hand, he tries to testify from the best of his recollection as to this one specific telephone conversation which took place in the course of some twenty-five months of business activities, then of course the suggestion is, well, he testified to it, he seemed to know what happened so his memory hasn't failed, has it?

It is perfectly obvious to everyone that memories do fail and particularly memories as to events occurring in the ordinary course of business some five years ago or very nearly five years ago, and that we submit on the basis of the Taylor case alone that is sufficient to warrant a dismissal of the indictment.

It is too late to ask these people to respond to criminal charges some nearly five years after they were supposed [29] to have occurred and while the information was in the U. S. Attorney's office and could have been brought momentarily for over three years or for a three-year period.

The statute of limitations does not govern this particular matter. The statute of limitations cannot modify the Sixth Amendment, right to a speedy trial. The Congress could not pass a statute of limitations providing for a five-year statute of limitations or no statute of limitations on criminal conduct and then say whatever the statute of limitations happens to be controls the measure of the right to a speedy trial under the Constitution.

The Orsinger case, which Mr. Frankel cited to Your Honor just a little while ago deals only with the details of a lengthy investigation of a complex series of business transactions being conducted by Mr. Orsinger for a long time with the unbeknownst accommodation of the clients he was supposed to have represented and who were not aware of the fact that they had been improperly treated by Mr. Orsinger until a long period of time had elapsed. And then there followed from that an investigation which was vigorously resisted by Mr. Orsinger in each case.

In this case all the facts were known to the Federal Trade Commission in 1967. If the U. S. Attorney's office had not communicated with the Federal Trade Commission they would have known of them by reading the Washington [30] Post in October of 1967 and as we have said before, no

need to repeat, the indictment was not returned until April of 1970 and that is too long a period of time to wait.

The Court: It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

The Court, therefore, views that there has been a lack [31] of speedy prosecution in this case, and will grant the motion to dismiss.

The Deputy Marshal: This Honorable Court stands recessed until return of Court.

(Thereupon, at 11:45 o'clock a.m., hearing in the above-styled cause was concluded.)

* * * * * * * * * * *

CERTIFICATE OF REPORTER

I hereby certify that the foregoing 31 pages constitute the official transcript of proceedings had in the above-styled cause.

/s/ E. A. Kaufer
Official Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., ET AL.

ORDER

Upon consideration of the Motion of the defendant William R. Marion, Sr., to Dismiss Indictment for Failure to Afford Speedy Trial (adopted by the defendant Samuel C. Cratch, Jr.), and the Memoranda of Points and Authorities and Exhibits submitted in support thereof and in opposition thereto, and the oral argument of counsel thereon, for the reason set forth in the oral Opinion of the Court of June 8, 1970, it is, this 8th day of June, 1970.

Ordered, That the Motions to Dismiss the Indictment be and they are hereby granted as to both defendants, and the Indictment, and each Count thereof, is dismissed as to both defendants.

/s/ George L. Hart, Jr.,
Judge.

I hereby certify that copies of the foregoing and annexed Order were this 8th day of June, 1970, mailed, postage prepaid, to Sandor Frankel, Esq., Assistant United States Attorney, United States Courthouse, Washington, D.C., and to Benjamin W. Cotten, Esq., attorney for Samuel Cratch, 1314 19th Street, N.W., Washington, D.C.

s/ T. P. Jackson
Thomas Penfield Jackson

A True Copy
Robert M. Stearns, Clerk
By Esther E. Cueden, Deputy Clerk

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals, pursuant to 18 U.S.C. § 3731, to the Supreme Court of the United States from the order of this Court entered June 8, 1970, dismissing the indictment herein.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.
SEYMOUR GLANZER,
Assistant United States Attorney.
SANDOR FRANKEL,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing notice of appeal has been mailed to Thomas P. Jackson, Esquire, counsel for defendant Marion, at 1828 L Street, N.W., Wash., D.C. 20036, and Benjamin W. Cotten, Esquire, counsel for defendant Cratch at 1314 19th Street N.W., Wash., D.C. 20036, this 8th day of July, 1970.

JOHN A. TERRY,
Assistant United States Attorney.

SUPREME COURT OF THE UNITED STATES

No. 810———, October Term, 1970

UNITED STATES, *Appellant,*

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

March 1, 1971

☆ U.S. Government Printing Office: 1971—422-103/579

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court did not deliver a written opinion. Its oral explanation of its ruling is set out in Appendix A, *infra,* p. 11.

JURISDICTION

On June 8, 1970, the United States District Court for the District of Columbia entered an order dismissing the indictment on the ground of lack of speedy prosecution (App. B., *infra,* p. 12). A notice of appeal was filed on July 8, 1970 (App. C, *infra,* p. 14). On August 28, 1970, the Chief Justice extended the time for docketing the appeal to and including October 6, 1970. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes a direct appeal from a decision sustaining a motion in bar where the defendants have

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not been put in jeopardy. See, *e.g.*, *United States* v. *Blue*, 384 U.S. 251.

QUESTIONS PRESENTED

Whether an indictment may properly be dismissed because of pre-indictment delay that was not purposeful, oppressive or actually prejudicial to the defendants.

STATEMENT

On April 21, 1970, an indictment was filed in the United States District Court for the District of Columbia, charging appellees with mail fraud (four counts), wire fraud (one count) and transporting falsely made securities in interstate commerce (fourteen counts), in violation of 18 U.S.C. 1341, 1343, and 2314. The indictment alleged that from March 15, 1965 to February 6, 1967, appellees had operated a business in North Brentwood, Maryland, known as Allied Enterprises, Inc., which sold and installed home intercom systems, fire control systems, burglary detection systems, and the like; that they had induced homeowners to enter into contracts through false promises; that after making token starts on the installation work specified in the contracts, appellees induced the homeowners to sign partially executed deeds of trust or promissory notes, which they thereafter secretly altered and transferred to persons or firms who purported to be holders in due course; and that in furtherance of their scheme appellees committed the conduct forming the basis for each count in the indictment. Twenty-one named individuals and

"divers other persons" were described as victims of the scheme.

On May 5, 1970, appellees filed a motion to dismiss the indictment on the ground that they had been denied a speedy trial. At a hearing conducted by Judge Hart on June 8, 1970, the following was adduced.[1] In September and October 1967, the Washington Post published a series of articles dealing with deceptive practices of certain home improvement companies. Although most of the articles exposed the fraudulent operations of another firm, on October 4 the newspaper mentioned appellees and their company, Allied Enterprises (Tr. 7–8). On several occasions the Post articles contained comments by the then United States Attorney for the District of Columbia to the effect that his office had begun intensively investigating the practices of the home improvement firms; that a two man "fraud squad" had been specially designated to investigate allegations of deception; that a special grand jury sworn on October 9, 1967, would devote some time to reviewing the practices of companies mentioned in the newspaper articles; that his office had been receiving complaints for two years, and two indictments (not connected with the defendants) had already been filed earlier that year; and that he expected indictments in the present cases within two weeks (Tr. 6–11). The newspaper also quoted the United States Attorney as stating that the fraud claims are "not the crimes of violence

[1] No witnesses were called by either side at the June 8 hearing. The factual description is derived from the colloquy between the court and counsel.

I am now particularly interested in, of course, but it is the kind of illegal conduct we will look into." (Tr. 7). The indictment against defendants was not filed until April 21, 1970. The grand jury, which returned the indictment, had been sworn on September 2, 1969.

After quoting at length from the Washington Post articles, particularly the remarks attributed to the United States Attorney, defense counsel argued that the government could have proceeded long before it did, and suggested that defendants' recollections and counsel's ability to prepare their defenses were apt to have been seriously prejudiced by the delay. In counsel's view, the probability of memory lapses, coupled with the "intense notoriety" the case had received in 1967 and the "repeated suggestions" by the United States Attorney that indictments were expected to be returned momentarily, warranted dismissal of the indictment (Tr. 12–16).

Government counsel responded that he had stipulated to the authenticity of the newspaper articles cited by the defense, but not to the truth of their substantive allegations, upon which he was in no position to comment because he was not a member of the United States Attorney's Office at the time. Counsel stated that he had been advised that the delay was evidently occasioned by a heavy case load and an understaffed office (Tr. 23–24). In any event, he noted that no actual prejudice to appellees had resulted from the delay, since the evidence in the case was essentially documentary and the scheme alleged in the indictment would be shown to have been the customary manner in which they conducted business; thus,

they would not be called upon to recite specific detailed instances divorced from their usual dealings. Moreover, the prosecutor cited the existence of several pending civil actions against the defendants, which would necessarily assist them in maintaining their recall. In addition, he noted that pertinent documents in the government's custody had always been available for inspection by the defendants or their counsel. Finally, government counsel argued that a speedy trial claim based upon the possibility of faulty memories resulting from delay was premature at that stage.

Following argument of counsel, Judge Hart issued his order granting dismissal. He ruled that the matters necessary for prosecution had been known to the government in late 1967 and that there was no reason for delaying the indictment almost three years. Referring to the fact that the counts in the indictment involved specific transactions, Judge Hart concluded that "by the nature of this outrageous scheme," the defendants's ability to recollect and prepare their defense was "bound to have been seriously prejudiced by the delay." (App. A, *infra*, p. 11.)

THE QUESTIONS ARE SUBSTANTIAL

At issue in this case are several important questions relating to the right to a speedy trial, not yet decided by this Court and not uniformly resolved in the lower courts. A threshold matter is whether the time elapsing between the alleged commission of an offense and the initiation of criminal proceedings is to be considered at all in a speedy trial claim. Most courts

apparently agree with the Eighth Circuit, which recently adhered to its "firmly established" rule that the protection afforded by the Sixth Amendment has no application until after criminal proceedings are instituted. *Terlikowski* v. *United States*, 379 F. 2d 501, 504 (C.A. 8); certiorari denied, 389 U.S. 1008. See *United States* v. *Durham*, 413 F. 2d 1003 (C.A. 5), certiorari denied, 396 U.S. 839; *Benson* v. *United States*, 402 F. 2d 576 (C.A. 9); *Pitts* v. *North Carolina*, 395 F. 2d 182 (C.A. 4); *Hoopengarner* v. *United States*, 270 F. 2d 465 (C.A. 6); *United States* v. *Dallago*, 311 F. Supp. 227 (E.D. N.Y.). These jurisdictions generally look to the statute of limitations as exclusively controlling the question of fairness of pre-indictment delay. Cf. *United States* v. *Ewell*, 383 U.S. 116, 122. Others, however, have adopted a more flexible rule, observing that it is possible to conceive of delay shorter than the period of the statute of limitations but nevertheless so unreasonable and seriously prejudicial to the defendant under the circumstances of a particular case that relief must be afforded, if not under the Sixth Amendment, then under the due process clause of the Fifth Amendment. *United States* v. *Lee*, 413 F. 2d 910 (C.A. 7), certiorari denied, 396 U.S. 1022; *United States* v. *Napue*, 401 F. 2d 107 (C.A. 7), certiorari denied, 393 U.S. 1024; *United States* v. *Capaldo*, 402 F. 2d 821 (C.A. 2), certiorari denied, 394 U.S. 989; *United States* v. *Feinberg*, 383 F. 2d 60, 64–65 (C.A. 2), certiorari denied, 389 U.S. 1044; *Acree* v. *United States*, 418 F. 2d 427 (C.A. 10); but see *United States* v. *Reed*, 413 F. 2d

338 (C.A. 10), certiorari denied *sub nom. Sartain* v. *United States,* 397 U.S. 954.

Even under the latter approach, the dismissal of the indictment solely because of pre-indictment delay was erroneous in the instant case. Prosecutorial delay *per se* has never been regarded as justifying the extraordinary remedy of discharging a lawsuit; to justify this drastic result, at least there must be a showing that the government's conduct was "purposeful or oppressive". *Pollard* v. *United States,* 352 U.S. 354, 361. This Court has never delineated the precise meaning of these terms. Perhaps no clearcut legal definition is readily possible, since the situations in which speedy trial claims arise are so widely varied. But the conduct shown here can not fairly be characterized as either purposeful or oppressive even in the broadest sense; at most what has been shown is non-action on the part of the government, with no specific benefit intended to be or actually derived from the delay.[2] In any event, the government's primary reason for delaying was the absence of a sufficient work force to deal with cases such as the instant one, and the need to use available manpower to prosecute offenses commanding a higher priority, particularly crimes of violence.[3] Such "institutional inefficiency,"

[2] Indeed, given the notoriety of appellees' practices in 1967, it is conceivable that the bringing of the indictment in 1970 might have protected them against a trial affected by contemporary publicity.

[3] Judge Hart remarked that sometime during the period of delay he attempted to urge the Department of Justice to provide more assistance to the United States Attorney and that he heard that the United States Attorney had informed the Assistant Attorney General in charge of the Department's Crim-

Hinton v. *United States*, 424 F. 2d 876, 881 (C.A. D.C.), while unfortunate, is not cured by dismissing cases when action is finally taken, unless there is injustice in a particular case.

Moreover, even if the government's inaction were regarded as purposeful or oppressive, this still would not warrant dismissal of the indictment unless serious prejudice to the appellees were established. The prejudice usually required to support a speedy trial claim relates to absence of critical witnesses, faulty memories and loss of evidence. Some of these factors may be affected by defendant's remaining in jail before trial. But here the appellees were not incarcerated and the only conceivable harm from pre-indictment delay would be increased difficulty in reconstructing revelant evidence which has not been preserved through documentation. This sort of inherent prejudice has not been deemed to warrant the extreme result of dismissal, except in the most unusual and clearly distinguishable case of *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.). The *Ross* court later limited that decision to its facts, and refused to sustain speedy trial motions unless there is a showing of prejudice beyond that which is the ordinary and inevitable result of delay. *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845. See also *United States* v. *Orsinger*, No. 22,756 (C.A. D.C.) decided June 3, 1970, certiorari pending,

inal Division that additional help was not needed (Tr. 11, 24). These hearsay matters, even if proper for the court's consideration in this particular case, hardly amount to purposeful or oppressive behavior, especially in the absence of any showing that extra help was available.

No. 442, this Term; *Post* v. *United States,* 407 F. 2d 319, 320 n. 3 (C.A. D.C.), certiorari denied, 393 U.S. 1092. Here, as in *United States* v. *Ewell, supra,* 383 U.S. at 122, any possible claim of prejudice to the appellees in defending themselves is "insubstantial, speculative and premature."

Last term, in *Dickey* v. *Florida,* 398 U.S. 30, the Court reviewed a claim based upon the right to a speedy trial. Since in that case the delay was found to be purposeful and the prejudice was readily apparent, the Court did not have to consider such matters as the right of a defendant to challenge delays occurring prior to arrest or indictment, the need to establish prejudice, or the degree of prejudice that must be shown. Mr. Justice Brennan, in his concurring opinion, observed that "the Court has as yet given scant attention to these and other questions essential to the definition of the speedy-trial guarantee." 398 U.S. at 40. This case provides an appropriate vehicle to examine the right to a speedy trial further in an effort "to trace its contours." 398 U.S. at 41.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should note probable jurisdiction.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

OCTOBER 1970.

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APPENDIX A

Oral Opinion of the District Court, June 8, 1970

The COURT. It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss.

APPENDIX B

In the United States District Court for the District of Columbia

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., ET AL

ORDER

Upon consideration of the Motion of the defendant William R. Marion, Sr., to Dismiss Indictment for Failure to Afford Speedy Trial (adopted by the defendant Samuel C. Cratch, Jr.), and the Memoranda of Points and Authorities and Exhibits submitted in support thereof and in opposition thereto, and the oral argument of counsel thereon, for the reason set forth in the oral Opinion of the Court of June 8, 1970, it is, this 8th day of June, 1970.

Ordered, That the Motions to Dismiss the Indictment be and they are hereby granted as to both defendants, and the Indictment, and each Count thereof, is dismissed as to both defendants.

/s/ George L. Hart, Jr.,
Judge.

I hereby certify that copies of the foregoing and annexed Order were this 8th day of June, 1970, mailed, postage prepaid, to Sandor Frankel, Esq., Assistant United States Attorney, United States Courthouse, Washington, D.C., and to Benjamin W. Cotten, Esq.,

attorney for Samuel Cratch, 1314 19th Street, N.W., Washington, D.C.

/s/ T. P. Jackson,
THOMAS PENFIELD JACKSON.

A True Copy

ROBERT M. STEARNS,
Clerk.

By ESTHER E. CUEDEN,
Deputy Clerk.

APPENDIX C

United States District Court for the District of Columbia

No. 672–70. Criminal

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals, pursuant to 18 U.S.C. § 3731, to the Supreme Court of the United States from the order of this Court entered June 8, 1970, dismissing the indictment herein.

THOMAS A. FLANNERY,
United States Attorney.
JOHN A. TERRY,
Assistant United States Attorney.
SEYMOUR GLANZER,
Assistant United States Attorney.
SANDOR FRANKEL,
Assistant United States Attorney.

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing notice of appeal has been mailed to Thomas P. Jackson, Esquire, counsel for defendant Marion, at 1828 L Street, N.W., Wash., D.C. 20036, and Benjamin W. Cotten, Esquire, counsel for defendant Cratch at 1314 19th Street N.W., Wash., D.C. 20036, this 8th day of July, 1970.

JOHN A. TERRY,
Assistant United States Attorney.

APPENDIX D

United States District Court for the District of Columbia

Holding a Criminal Term, Grand Jury Sworn in on September 2, 1969

Criminal Case No. ——

UNITED STATES OF AMERICA

v.

WILLIAM R. MARION, SR., SAMUEL C. CRATCH, JR.

Grand Jury Original ——

Violations: 18 U.S.C. 1341 (Mail Fraud); 18 U.S.C. 1343 (Wire Fraud); 18 U.S.C. 2314 (Transportation of Falsely Made, Forged, and Altered Securities); 18 U.S.C. 2 (Aiding and Abetting)

The Grand Jury charges:

COUNT 1

1. From on or about March 15, 1965 and continuing thereafter up to and including February 6, 1967, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants herein, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud Alonzo Shearer, Thelma Shearer, Lawrence Hatton, Edna Hatton, William Jones, Evelyn Jones, Allie Mae Asberry, Bettie P. Staley, Sereta S. Staley, Lucille N. Brooks, Rosa Johnson, Inez Johnson, Rev. Andrew Williams, James Gray, Marion Gray, Sherman Webster, Samuel Duncan, Alice Dun-

can, George Crutchfield, Ruth Crutchfield, Geneva Gardner, and divers other persons, each and all of whom were members of and constituted a class of persons who possessed and enjoyed a right, title and interest in real property, and are herewith referred to as the Homeowners, and to obtain money and property by false and fraudulent pretenses, promises, and representations which pretenses, promises, and representations the defendants well knew would be and were false and fraudulent when made.

2. It was part of said scheme and artifice to defraud that the defendants would and did operate a corporation trading as Allied Enterprizes, Inc. ("Allied"), and would and did maintain offices at 4550 Rhode Island Avenue, North Brentwood, Maryland, from which address the defendants would and did trade as Allied, and over whose affairs and policies the defendants would and did exert their influence and control.

3. It was a further part of said scheme and artifice to defraud that the defendants would and did cause an intensive sales campaign by telephone solicitors and salesmen to be utilized in order to promote in the District of Columbia and elsewhere the sale of home intercom systems, burglary detection systems, fire control systems, and similar systems.

4. It was a further part of said scheme and artifice to defraud that the defendants would and did directly and indirectly by false and fraudulent pretenses, promises, and representations induce the Homeowners to enter into purported contracts for the installation of said systems, including, but not limited to, the false representation that Homeowners, by providing "Allied" with names and addresses of friends and acquaintances as prospective customers, would be participating in a sales-referral plan which would sub-

stantially reduce the cost of said systems to the Homeowners and provide financial benefits to the Homeowners.

5. It was a further part of said scheme and artifice to defraud that the defendants would and did prevent the Homeowners from canceling installation of the aforementioned systems by making token starts on the installation following the signing of the purported contracts but before Homeowners' credit had been approved, which practice was referred to as "spiking."

6. It was a further part of said scheme and artifice to defraud that the defendants would and did induce the Homeowners to sign documents the nature and character of which was falsely represented to and concealed from the Homeowners, to wit, documents styled (1) deeds of trust and (2) promissory notes.

7. It was a further part of said scheme and artifice to defraud that the defendants would and did alter the documents styled deeds of trust and promissory notes by thereafter inserting or causing to be inserted the following:

(a) trustees,
(b) date,
(c) payor,
(d) description of the properties to which said documents would pertain,
(e) principal amounts of indebtedness,
(f) terms of payment,
(g) interest charges, and
(h) late payment charges

without the knowledge, consent, or authority of the Homeowners.

8. It was a further part of said scheme and artifice to defraud that the defendants would and did cause to be certified by a notary public, an officer authorized to take acknowledgement of signatures on instruments

which by law may be recorded, that Homeowners personally appeared before a notary public and acknowledged the signatures appearing on the herein mentioned documents styled (1) deeds of trust and (2) promissory notes to be their act and deed.

9. It was a further part of said scheme and artifice to defraud that the defendants would and did cause for their monetary gain the transfer of the herein abovementioned (1) deeds of trust and (2) promissory notes to persons and firms who would purport to be and would masquerade as "holders in due course" and who would collect from the Homeowners monies purportedly due and owing on the deeds of trust and promissory notes.

10. It was a further part of said scheme and artifice to defraud that the defendants would and did knowingly, unlawfully and willfully make and cause to be made false and fraudulent pretenses, promises and representations to Homeowners well knowing at the time that the said pretenses, promises and representations would be and were false when made, including, but not limited to, the false representation that the deeds of trust and promissory notes were mere revisions of and additions to the original contracts.

11. It was a further part of said scheme and artifice to defraud that the defendants would and did, knowingly and willfully, cause to be concealed and did fraudulently conceal from Homeowners the following:

(a) The character and nature of the documents which Homeowners were induced to sign;

(b) Deeds of trust signed by unsuspecting Homeowners would be and were thereafter notarized;

(c) Deeds of trust signed by Homeowners would be and were recorded in the land records of the District of Columbia;

(d) Documents bearing the signatures of Homeowners as thereafter completed would be and were transferred to third parties for money.

12. It was a further part of said scheme and artifice to defraud that the defendants would and did cause certain "congratulatory letters" and token checks to be transmitted to Homeowners for the purpose of and with the intent to lull said Homeowners into inaction concerning the defendants' fraudulent actions and misrepresentations with respect to the chain referrals and the documents styled contracts, deeds of trust, and promissory notes.

13. On or about September 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Alonzo Shearer, 1218 Oates Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 2

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about September 17, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and let-

ter addressed to Lawrence Hatton, 408 13th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 3

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about November 3, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to William Jones, 2701 24th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 4

1. The Grand Jury realleges, and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 16, 1965, in the District of Columbia, for the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully and unlawfully did transmit and cause to be transmitted in interstate commerce by means of a wire communication, sounds, to wit, a telephone call between Allied Enterprizes, Inc., 4550 Rhode Island Avenue, North

Brentwood, Maryland and Allie Mae Asberry, 115 5th Street, N.E., Washington, D.C.

(Violations 18 U.S.C. 1343 and 2)

COUNT 5

1. The Grand Jury realleges and hereby incorporates by reference, all of the allegations of Count 1 of this indictment with the exception of those contained in paragraph 13 thereof.

2. On or about December 23, 1965, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, knowingly, willfully, and unlawfully caused to be delivered in the District of Columbia by the United States mails according to the directions thereon an envelope and letter addressed to Mrs. George H. Staley, 4643 Minnesota Avenue, N.E., Washington, D.C.

(Violations 18 U.S.C. 1341 and 2)

COUNT 6

On or about August 9, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Lucille N. Brooks, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 7

On or about August 12, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fradulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Alonzo Shearer and Thelma Shearer, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 8

On or about August 20, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rosa Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 9

On or about September 5, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Lawrence Hatton and

Edna Hatton, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 10

On or about September 10, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled, "Deed of Trust" and "Promissory Note" bearing the signature Inez Johnson, knowing the same to have been falsely made, forged, and altered.

(Violations of 18 U.S.C. 2314 and 2)

COUNT 11

On or about October 4, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Bettie P. Staley and Sereta S. Staley, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 12

On or about October 26, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and

cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Rev. Andrew Williams, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 13

On or about October 30, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures William Jones and Evelyn Jones, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 14

On or about December 19, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures James Gray and Marion Gray, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 15

On or about December 21, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Sherman Webster, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 16

On or about December 23, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Allie Mae Asberry, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 17

On or about December 27, 1965, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures Samuel Duncan and

Alice Duncan, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 18

On or about January 1, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signatures George Crutchfield and Ruth Crutchfield, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

COUNT 19

On or about January 19, 1966, William R. Marion, Sr., and Samuel C. Cratch, Jr., the defendants, with unlawful and fraudulent intent, did transport and cause to be transported in interstate commerce from the State of Maryland to the District of Columbia falsely made, forged, and altered securities, that is, documents styled "Deed of Trust" and "Promissory Note" bearing the signature Geneva Gardner, knowing the same to have been falsely made, forged, and altered.

(Violations 18 U.S.C. 2314 and 2)

____ ____,

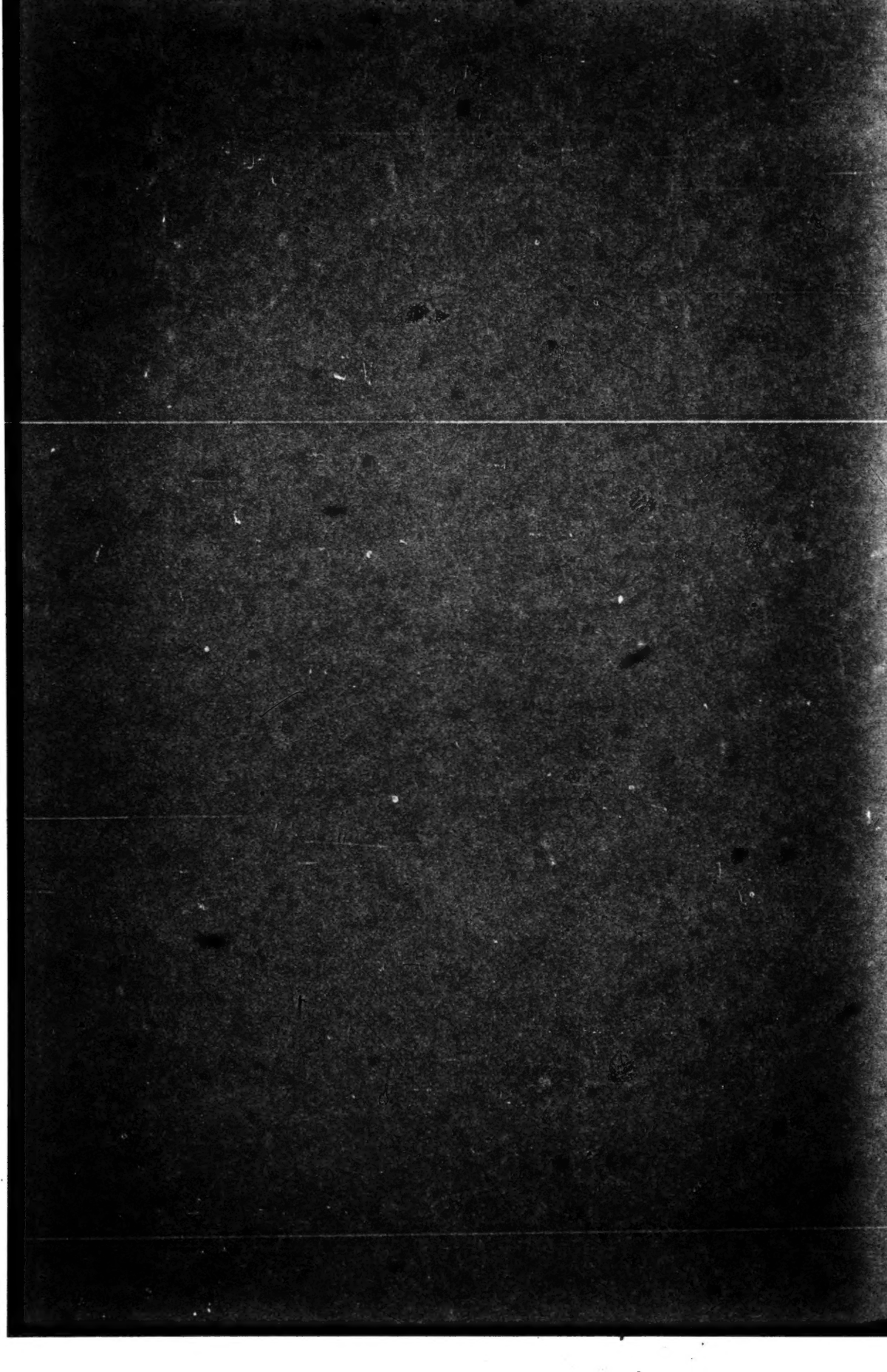
Attorney of the United States,
in and for the District of Columbia.

A True Bill:

____ ____,

Foreman.

U.S. GOVERNMENT PRINTING OFFICE: 1970



IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 810

UNITED STATES OF AMERICA, *Appellant*,

v.

WILLIAM R. MARION, SR., ET AL., *Appellees*.

On Appeal From the United States District Court for the District of Columbia

---

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the United States Supreme Court Rules, appellees William R. Marion and Samuel C. Cratch move the Court to dismiss the appeal herein on the grounds that the appeal is not within the jurisdiction of the Court. In the alternative, appellees move the Court to affirm the judgment of the United States District Court for the District of Columbia on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

An Appeal by the Government to the Supreme Court From the Dismissal of the Indictment Is Not Authorized by the Criminal Appeals Act.

Appellate jurisdiction of Federal courts exists only to the extent expressly conferred by statute. *Carroll* v. *United States,* 354 U.S. 394 (1957). Authority for appeals by the Government in criminal cases is provided by the Criminal Appeals Act, 18 U.S.C., § 3731, but such appeals are "unusual, exceptional, not favored," *Carroll* v. *United States, supra,* at 400, and the statute will be strictly construed against the Government's right of appeal. Not only does an appeal by the Government from a judgment terminating a criminal prosecution favorably to the accused "offend the policies behind the double-jeopardy prohibition," *Will* v. *United States,* 389 U.S. 90, at 96 (1967), but, when the judgment is entered upon a motion prior to trial in a pending case, delays any trial ordered upon reversal for the duration of the appellate proceedings. *Will* v. *United States, supra.*

The Government asserts that this Court's jurisdiction to entertain the instant direct appeal from the decision of the United States District Court depends upon that portion of the Criminal Appeals Act, 18 U.S.C., § 3731, providing for review by this Court of

> ". . . the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

In the relatively few instances in which the Court has expressly decided whether the decision it was being asked by the Government to review was one sustaining a motion (or plea) "in bar," the Court has been influenced by theories of common law pleading under-

lying the language of the statute. See *United States* v. *Storrs,* 272 U.S. 652 (1926), and Brennan, J., concurring in *United States* v. *Mersky,* 361 U.S. 431, at 441 (1960). Compare *United States* v. *Sisson,* 399 U.S. 267 (1970). But the Court has stated that it intends to look beyond the pleadings to "the effect of the ruling sought to be reviewed." If the effect is "to end the cause and exculpate the defendants," then it will be treated as a "bar" to the prosecution and, thus, appealable to the Court. *United States* v. *Hark,* 320 U.S. 531, at 536 (1944); *United States* v. *Blue,* 384 U.S. 251 (1966).

Nevertheless, not all pre-trial motions by defendants which, when granted, terminate the prosecution as a result of the Government's practical inability or unwillingness to proceed are considered motions "in bar." *Carroll* v. *United States,* 354 U.S. 394 (1957) Nor are post-trial motions vitiating convictions always treated as decisions "arresting a judgment" similarly appealable. *United States* v. *Sisson,* 399 U.S. 267 (1970).

Appellees' Motion to Dismiss the indictment for failure to afford a speedy trial was grounded upon both the 5th and 6th Amendments to the Constitution of the United States. (Appellees' Appendix, page 11). In ruling upon the Motion, however, the District Judge made no reference whatsoever to the Constitution. After summarizing the chronology of the alleged offenses and the Government's delayed reaction, the District Judge stated

> "The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the Motion to Dismiss." (Appellant's Appendix A, page 11).

The decision thus appears to have been based upon Rule 48(b) F.R.Crim.P., which provides

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

This Court has not to date, to appellees' knowledge, decided whether dismissal of an indictment for "unnecessary delay in presenting the charge to a grand jury" is a "decision or judgment" of a District Court subject to review on direct appeal of the Government to this Court under 18 U.S.C., § 3731. A motion to dismiss for want of prosecution, however, is universally regarded as one addressed to discretion of the trial judge. *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *Nickens* v. *United States* 323 F.2d 808 (D.C. Cir. 1963), certiorari denied, 379 U.S. 905.

As a practical matter, the Order of the District Court granting appellees' Motion to Dismiss the indictment may terminate proceedings under this indictment. It does not as a matter of law, however, purport to preclude the Government's ever attempting to prosecute for the same events, nor does it "exculpate" the defendants.

And, as a discretionary ruling, grounded on a unique state of facts not appearing in the indictment, this decision of a single District Judge imperils no contrary decisions in other districts, nor does it frustrate law enforcement efforts in other cases in the District of Columbia. It merely reflects the opinion of one Dis-

trict Judge that the Government, having knowledge of an alleged crime, and the identity of the one alleged to have committed it, for its own reasons dallied too long in beginning prosecution for it. Thus, it is not within the policy sought to be implemented by the Criminal Appeals Act. See *United States* v. *Mersky*, 361 U.S. 431, at 434-436 (1960). Moreover, to allow a direct appeal to the Court here would interpret the jurisdiction of the Court to include other discretionary rulings which, as practical matters, end the prospect of criminal prosecution. The Court has, in other circumstances, found expansive construction of its appellate jurisdiction not warranted solely for that reason. *American Security and Trust Co.* v. *Commissioners of District of Columbia*, 224 U.S. 491 (1912).

II.

The District Court's Dismissal of the Indictment Was Justified on Both Discretionary and Constitutional Grounds.

The indictment dismissed by the District Court charged that from March 15, 1965, through February 6, 1967, the co-defendants had engaged in a "scheme and artifice to defraud," in connection with the business of Allied Enterprizes, Inc., namely, the credit sale to home-owners of electronic intercom and fire alarm systems, with the deferred portion of the purchase price secured by deeds of trust of the purchasers' homes. The defendants were charged (each as both a principal and as an aider-and-abettor), in 19 counts accusing them of mail fraud, wire fraud, and interstate transportation of fraudulent securities, committed against 21 named victims and others unnamed on unspecified dates during the 23-month period embraced in the indictment. Allegations as to the fraud supposed to have been committed and the identity of the

victims were imprecise, e.g. "including, but not limited to" (Count 1, paragraph 4); "and divers other persons," (Count 1, paragraph 2); and in the conjunctive, e.g., "falsely made, forged, *and* altered" securities (Counts 6-19. Emphasis supplied), (Appellant's Appendix D, pages 15-26).

On December 8, 1966, the Federal Trade Commission docketed its Complaint charging the appellees and Allied Enterprizes, Inc., with violations of the Federal Trade Commission Act, and that proceeding culminated in a cease-and-desist order entered by default February 6, 1967. In September and October of 1967, the business practices of Allied Enterprizes, Inc., and similar firms in Washington, D. C., metropolitan area were the subject of a series of articles in *The Washington Post,* charging the firms with fraud and purporting to quote the then U. S. Attorney as to the prospect of prosecution which, at the time, was said to be imminent. (Exhibits B-M to Defendant Marion's Motion to Dismiss). Allied Enterprizes, Inc., was specifically named in an article dated October 4, 1967 (*Id.,* Exhibit F).

In "the summer of 1968" Marion voluntarily delivered all of the records of Allied Enterprizes, Inc., to the U. S. Attorney, where they remain today.

Not until March 16, 1970, however, did Marion become aware that a Grand Jury had actually begun an investigation (Motion to Dismiss, paragraph 5, Appellees' Appendix, page 12), and the indictment was not filed until April 21, 1970.

Thus, it is apparent that Federal authorities (the FTC) were aware (and critical) of appellees' activities in December of 1966, and the entire community was

apprised of those activities in October of 1967. The only explanation offered by the Government for a delay of nearly three-and-one-half years in initiating prosecution was a "heavy case load" and an "understaffed" U. S. Attorney's office in the District of Columbia. (Jurisdictional Statement, pages 4, 7).

The Government's Opposition to the Motion to Dismiss contended that the Constitutional right to a speedy trial does not attach until after arrest or indictment, the time within which the Government must indict following an offense being measured exclusively by the statute of limitations. Its Jurisdictional Statement acknowledges an exception for "purposeful or oppressive" delay. (Jurisdictional Statement, page 7). Moreover, the Government contends actual prejudice need be shown before a defendant becomes entitled to dismissal for pre-indictment delay (Jurisdictional Statement, page 8).

Appellees submit that neither proposition is sound.

To permit the statute of limitations to be the exclusive measure of the time the Government shall have to begin prosecution of one suspected of a crime, regardless of the time when the Government learned of the offense and the identity and whereabouts of the accused, confers upon Congress the exclusive power to determine the dimensions of a constitutional right.* See Brennan, J., concurring in *Dickey* v. *Florida,* 398 U.S. 30, at 47 (1970). Moreover, the ministerial formality of the filing of an indictment, an event entirely within the control of the Government, is a nearly

* Title 18, U.S.C. § 3282, the statute of limitations on non-capital crimes, was amended September 1, 1954, to increase the period of limitations from three to five years.

meaningless point along the continuum of crime to punishment at which to begin the time for a "speedy trial" running. Pre-indictment delay may be as prejudicial or more to a just deposition of accusations of crime as post-indictment delay, because a potential defendant will be unaware of what he will be expected to defend against, and, thus, inattentive to preserving the evidence necessary to do so. See *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial*, page 22, (Tentative Draft 1967); Note, *The Right to a Speedy Trial*, 20 Stan. L. Rev. 476, at 488-490 (1968). "Anxiety and concern accompanying public accusation," *United States* v. *Ewell*, 383 U.S. 116, at 120 (1966), is, if anything, intensified when the "public accusation" is made in the media, as in the instant case, while the prosecuting authorities remain inscrutably inactive.

If pre-indictment delay is potentially prejudicial to an accused and the source of anxiety to him, it is none the less so when done negligently, or as the result of the "institutional inefficiency" of the prosecutor's office rather than "purposefully" or "oppressively." Indeed, this Court has most recently found denial of a speedy trial without mention of the motive of the Government for its failure to bring an available defendant to trial. *Dickey* v. *Florida*, 398 U.S. 30 (1970). "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused," *Brady* v. *Maryland*, 373 U.S. 83, at 87 (1963). And the incentive to improve institutional efficiency is notably diminished if inefficiency is tolerated.

Nor should an accused be required to show specific actual prejudice as a condition to assertion of a right

to a speedy trial, if the prejudice claimed is that potentially inhering the lapse of memory through the passage of time. *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). Appellees submit that recollection of what representations, true or false, were made by whom to which customers of an enterprise actively engaged in business over a 23-month period is, if anything, more difficult to preserve than recollection of one's whereabout on a particular day some seven months earlier. Compare *Ross* v. *United States,* 349 F.2d 210 (D.C. Cir. 1965). To require an accused, as a condition to successful assertion of his right to a speedy trial in advance of trial, to make specific showing of prejudice in the form of the loss of his memory of the relevant events places him in an impossible dilemma: a testimonial admission of the absence of specific recollection will bind him to the prosecution's witnesses' version in the event his claim is denied, while any effort at specific recall may contradict his attempted showing of prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Government's appeal should be dismissed, or the decision of the District Judge should be affirmed.

Respectfully submitted,

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February, 1971

APPELLEES' APPENDIX

Filed May 5, 1970

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 672-70

UNITED STATES OF AMERICA, *Plaintiff*,

v.

WILLIAM R. MARION, SR., et al., *Defendants*.

Motion To Dismiss Indictment for Failure To Afford Speedy Trial

The defendant William R. Marion, Sr., moves to dismiss the indictment for failure to commence prosecution of the alleged offenses charged therein within such time as to afford him his rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States.

For reason therefor, he says:

1. That the indictment charges that defendant engaged in a "scheme and artifice to defraud" from March 15, 1965, through February 6, 1967, but that no event is alleged therein to have occurred after January 19, 1966.

2. That he is informed and believes, and accordingly alleges, that the events charged in the indictment to constitute criminal offenses were the subjects of a series of articles appearing in *The Washington Post* newspaper, a daily newspaper of general circulation in the greater Washington, D. C., Metropolitan area, in October of 1967, and were thus matters of public knowledge as of that time.

3. That, to his best recollection, in the summer of 1968, this defendant voluntarily delivered to Seymour Glanzer, Esq., and Sandor Frankel, Esq. Assistant United States

Attorneys for the District of Columbia, at their request, all of the files of Allied Enterprises, Inc., and that said files have at all times thereafter remained in the possession of the Office of the United States Attorney for the District of Columbia.

4. That, to his best recollection, in the summer of 1968, the defendant voluntarily discussed his activities as an officer of Allied Enterprises, Inc., with the said Seymour Glanzer and Sandor Frankel, Esqs., at their request, and that he fully apprised them of such activities, all of which were, in his opinion, of an entirely innocent nature.

5. That, notwithstanding the foregoing, the Grand Jury herein was not impanelled until September 2, 1969, and defendant was not apprised that the events alleged in the indictment were under consideration by a Grand Jury until advised by counsel that a subpoena had been issued to command his testimony before the same on or about March 16, 1970.

6. That the delay of over five years from the time defendant is first alleged to have commenced the alleged "scheme and artifice" to defraud, of over four years from the time the last event charged in the indictment allegedly occurred, and of nearly three years from the time at which such events became matters of general public knowledge, to the time of filing of the indictment herein, is an unreasonably oppressive and unjustifiable time after the alleged offenses.

7. That the indictment charges defendant with numerous general misrepresentations allegedly made to divers persons, on dates unspecified; with numerous instances of telephone and postal communication of a nature undescribed; and with numerous instances of interstate transportation of securities allegedly false, forged, and altered in respects unknown, over a period of approximately 23 months more than three years past; and, further, that the

indictment charges defendant as both principal and aider and abetter as to each.

8. That it is unreasonable and oppressive, and in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States, to require the defendant to answer and defend against charges of stale offenses, under circumstances requiring precise memory of events long past, and the production of evidence, both testimonial and documentary, which may have become unavailable by the passage of time.

JACKSON, GRAY & LASKEY

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Thomas Penfield Jackson

By JAMES P. SCHALLER
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Attorneys for Defendant Marion

* * * * * * * * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 810

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not deliver a written opinion. Its oral explanation of its ruling is set out at App. 39.

JURISDICTION

On June 8, 1970, the district court entered an order dismissing the indictment on the ground of lack of speedy prosecution. A notice of appeal was filed on July 8, 1970. On March 1, 1971, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits (App. 42). Under 18 U.S.C. 3731, this Court has jurisdiction, on direct appeal, to review a decision sustaining a motion in bar, where the defendants have

not been put in jeopardy. See *United States* v. *Blue*, 384 U.S. 251; *United States* v. *Ewell*, 383 U.S. 116, and *infra*, pp. 13–14.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under former 18 U.S.C. 3731 to consider the government's appeal from an order dismissing an indictment on the ground that there has been a lack of speedy prosecution.

2. Whether the Sixth Amendment's guarantee of a speedy trial applies before charges have been brought.

3. Whether the Due Process Clause of the Fifth Amendment provides a basis for shortening the criminal statutes of limitations specified by Congress, or whether the courts should ordinarily assume such a function in the exercise of supervisory power.

4. Whether, even if the courts should enter this area, an indictment may properly be dismissed on the basis of pre-indictment delay that was not purposeful, oppressive, or actually prejudicial to the defendants.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been com-

> mitted, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. 3731 provides in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

Rule 48(b), F.R.Cr.P., provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT

On April 21, 1970, an indictment was filed in the United States District Court for the District of Co-

lumbia, charging appellees with mail fraud (four counts), wire fraud (one count) and transporting falsely made securities in interstate commerce (fourteen counts), in violation of 18 U.S.C. 1341, 1343, and 2314. The indictment alleged that from March 15, 1965, to February 6, 1967, appellees operated a business in North Brentwood, Maryland, known as Allied Enterprises, Inc., which sold and installed home intercom, fire control, and burglary detection systems, and the like; that they induced homeowners to enter into contracts through false promises and representations; that after making token starts on the installation work specified in the contracts, appellees induced the homeowners to sign partially executed deeds of trust or promissory notes, which they later secretly altered and transferred to persons or firms who purported to be holders in due course; and that in furtherance of their scheme appellees engaged in the conduct forming the basis for each of the nineteen counts in the indictment (App. 2–5). The earliest conduct forming the basis for a count in the indictment allegedly occurred on September 3, 1965 (count 1), the latest on January 19, 1966 (count 19). Twenty-one named individuals and "divers other persons" were described as victims of the scheme (App. 2).

On May 5, 1970, appellees filed a motion to dismiss the indictment on the ground that they had been denied a speedy trial (App. 12–14). Appellees asserted that the events charged in the indictment were a matter of public knowledge by October 1967, when they were described in a series of newspaper articles; that pertinent files of Allied Enterprises had been volun-

tarily turned over to the government in the summer of 1968, at which time appellee Marion had engaged in discussions with government counsel; and that notwithstanding these circumstances, the grand jury that indicted appellees was not empanelled until September 2, 1969, and appellees were not advised until March 1970 that the matters were under consideration. Appellees claimed that the delay between the time the offenses were alleged to have been committed and the indictment was unreasonable and oppressive under the Fifth and Sixth Amendments to the Constitution because they were now compelled to defend against charges that would require them to remember events long past and to produce "evidence, both testimonial and documentary, which may have become unavailable by the passage of time" (App. 13–14).

At a hearing conducted by Judge Hart on June 8, 1970, the following was adduced.[1] In September and October 1967, the Washington Post published a series of articles dealing with deceptive practices of certain home improvement companies (App. 24–25). Most of the articles were devoted to the operations of another firm, but, on October 4 the newspaper mentioned appellees and their company, Allied Enterprises (App. 26). On several occasions the Post articles contained comments by the then United States Attorney for the District of Columbia to the effect that his office had begun intensively investigating the practices of a dozen home improvement firms; that a two man "fraud squad" had been specially designated to investigate

[1] No witnesses were called by either side. The factual description is derived from the colloquy between the court and counsel.

allegations of deception; that a special grand jury sworn on October 9, 1967, would devote some time to reviewing the practices of such companies; that his office had been receiving complaints for two years, and two indictments (not connected with the defendants) had already been filed earlier that year; and that he expected indictments within two weeks (A. 24–28). The newspaper also quoted the United States Attorney as stating that the fraud claims are "not the crimes of violence I am now particularly interested in, of course, but it is the kind of illegal conduct we will look into." (A. 26).

After quoting at length from the Washington Post articles, particularly the remarks attributed to the United States Attorney, defense counsel argued that the government could have proceeded long before it did, and suggested that appellees' recollections and counsel's ability to prepare their defenses were apt to have been seriously prejudiced by the delay. In counsel's view, the probability of memory lapses, coupled with the "intense notoriety" the case had received in 1967 and the "repeated suggestions" by the United States Attorney that indictments were expected to be returned momentarily, warranted dismissal of the indictment (A. 29–30). There was, however, no specific reference to any particular prejudicial factor.

Government counsel responded that he had stipulated to the authenticity of the newspaper articles cited by the defense, but not to the truth of their substantive allegations, about which he was in no position to comment because he was not a member of the United States Attorney's Office at the time. Counsel stated that,

assuming the articles to be true, he had been advised that a heavy case load and an understaffed office prevented more expeditious handling of the matter. (App. 35). He noted that in any event no actual prejudice to appellees had resulted from the delay, since the evidence in the case was essentially documentary and the scheme alleged in the indictment would be shown to have been the customary manner in which the defendants conducted business; thus, they would not be called upon to recite specific detailed instances divorced from their usual dealings. The prosecutor cited the existence of several pending civil actions against the defendants involving the same fraudulent scheme,[2] which would necessarily assist them in maintaining their recall. In addition, he observed that the pertinent documents in the government's custody had always

[2] There were at least seven such cases in the United States District Court for the District of Columbia. (Appellees' company, Allied Enterprises, maintained its offices in Maryland (App. 3).)

One was brought by George and Ruth Crutchfield, who are named in Count 18 of the indictment as victims of appellees' fraudulent scheme. *Crutchfield* v. *Allied Enterprises, et al.*, Civ. No. 1916–66, settled as to all defendants except Allied on March 14, 1968; settled and dismissed with prejudice as to Allied on December 2, 1968.

Another involved the Reverend Andrew Johnson, who is named in Count 9 of the indictment as a victim of appellees' fraudulent scheme. *Benson, et al.* v. *Allied Enterprises, Cratch, Marion, et al.*, Civ. No. 2451–68. This was a class action; Reverend Johnson's affidavit was filed on March 3, 1969. The case is presently on appeal, Judge Hart having dismissed the complaint on October 30, 1970, for lack of personal service of process and for failure to state a cause of action in two of the 7 counts. (The complaint was filed on October 1, 1968.)

The other cases are:

Harris v. *Allied Enterprises et al.*, Civ. No. 1917–66 (last

been available for inspection by defendants or their counsel. Finally, he argued that a claim of denial of a speedy trial based upon the possibility of faulty memories resulting from delay was premature at this stage. (App. 32–36.) [3]

Following argument of counsel, Judge Hart issued his order dismissing the indictment. He ruled that the "matters complained of * * * were known from early 1967 or a matter of common knowledge in late 1967" and that the three-year "delay" from 1967 could not be justified by the need for "research and examination" because this could have been done sooner. Referring to the fact that the counts in the indictment involved specific transactions, Judge Hart concluded that "by the very nature of this outrageous

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docket entry—time for filing ready certification extended to December 31, 1968).

Talbert v. *Cratch et al.*, Civ. No. 1950–66 (settled and dismissed with prejudice December 30, 1968).

Elliott v. *Atlas Credit Corp., et al.*, Civ. No. 2629–66 (default judgment entered against Allied on February 6, 1969; dismissed as to Cratch on August 29, 1969).

Hawkins v. *Allied Enterprises, et. al.*, Civ. No. 253–67 (settled and dismissed with prejudice on May 12, 1969).

Johnson v. *Allied Enterprises, et al.*, Civ. No. 2458–67 (on May 4, 1971, a consent order was filed voiding a note payable to Allied and the plaintiffs' executed deed of trust).

[3] The Federal Trade Commission issued a complaint against Allied Enterprises and defendant Marion (App. 26), but when the respondents failed to answer and failed to appear for a hearing, the examiner, on February 6, 1967, issued a default judgment against them, ordering Allied and Marion to cease and desist from failing to inform their customers that even though they were purchasing under a referral plan they were nevertheless responsible for the full amount of their purchases. *Allied Enterprises, Inc.*, CCH Trade Reg. Rep. ¶¶ 17,737, 17,849 (Transfer Binder 1965–1967).

scheme," alleged in the indictment, the defendants' ability to recollect and prepare their defense was "bound to have been seriously prejudiced by the delay" (App. 39).

The applicable statute of limitations, 18 U.S.C. 3282, permits prosecution if the "indictment is found or the information is instituted within five years next after such offense shall have been committed." The indictment here was brought within the prescribed period.

SUMMARY OF ARGUMENT

I. Under former 18 U.S.C. 3731, the district court's order dismissing the indictment is a "judgment sustaining a motion in bar" and is therefore directly appealable to this Court. Appellees' plea before the district court did not challenge the allegations of criminal activity in the indictment, but rather urged dismissal because of pre-indictment delay. Under *United States* v. *Weller*, No. 77 (decided February 24, 1971), this is clearly a "motion in bar"; and the district court's order granting the motion permanently bars the government from prosecuting appellees for the offenses charged in the indictment.

II. The Sixth Amendment provides that in all "criminal prosecutions" the "accused" shall have the right to a speedy trial. Before arrest or indictment, however, a person is not an "accused" and the speedy trial guarantee therefore does not apply. That the framers so intended is confirmed by the history of the Sixth Amendment, which indicates that the right did not arise until criminal proceedings had commenced at least by way of arrest.

Expanding the Sixth Amendment to cover pre-arrest or pre-indictment delay by defining an "accused" as a person against whom the government has sufficient evidence to seek an indictment would be both unwarranted and unwise. Although one of the three policies underlying the right to a speedy trial might be implicated in this kind of delay—impairment of the ability to defend—the effect of the passage of time on a potential defendant does not depend on the quantum of evidence in the government's possession. Moreover, as *Hoffa* v. *United States,* 385 U.S. 293, recognized, the fact that the government has enough evidence to establish probable cause in no way obligates it to move against a suspect. Much more may be needed to secure a conviction. Also, where there is concurrent federal-state jurisdiction, federal prosecutors often must await the state's decision about whether it will fulfill its primary responsibility by prosecuting. In the regulatory area, the decision to prosecute may turn not on when sufficient evidence is available, but rather on the effectiveness of securing compliance by methods less stringent than criminal sanctions. In addition, the fact that certain evidence has been collected does not mean the case is assembled and ready to be presented to the grand jury. Furthermore, requiring prosecutorial action as soon as a certain amount of evidence has been discovered would encourage expediency and discourage thoroughness, thus impeding efforts to shorten the time between charge and trial, for the success of which thorough precharge preparation is essential. And finally, such an interpretation would

give rise to lengthy pretrial hearings and add still another preliminary hurdle before trial. For cases that are not dismissed at this stage, and this would doubtless consist of the overwhelming majority, the result would be to stretch out the period between charge and trial even further, to the detriment of all concerned.

III. These considerations also counsel against establishing a general rule under the Due Process Clause to supervise when criminal charges must be brought. In enacting the statute of limitations Congress balanced the harm to the defendant against other factors; this Court would have to do the same under the Due Process Clause. Congress' judgment is entitled to great weight and we submit that for cases brought with the statute of limitations, except those where the prosecutor has intentionally delayed in order to impair the defense, due process of law is not denied. Moreover, there are no circumstances presented here that warrant this Court's exercising its supervisory power to govern pre-indictment delay.

IV. Even if this Court were to decide that there should be judicial scrutiny of delay before indictment or arrest, the defendant must at least show that he has been prejudiced by the delay, assuming delay itself has been proven. The drastic remedy of dismissing a criminal prosecution brought within the statute of limitations can only be justified if the harm to the defendant far outweighs the public interest in trying offenders for their criminal acts.

Since the appellees have not shown any actual prejudice, the district court's order dismissing the indictment should be reversed under any theory. Appellees knew they were under criminal investigation; many civil suits involving activities charged in the indictment were being litigated during the supposed delay; the government's proof consisted essentially of documentary evidence, which did not become less reliable during this period; and appellees have not even alleged that any of their witnesses have disappeared or that any of their records have been lost.

ARGUMENT

The district judge dismissed the indictment because there "has been a lack of speedy prosecution in this case" (App. 39). The judge did not specify the precise basis for dismissal, although in view of the arguments of counsel (App. 15, 38), the judge's reference to "speedy prosecution," and the order granting appellees' motion to "Dismiss Indictment for Failure to Afford Speedy Trial" (App. 40), he appears to have relied upon the Sixth Amendment. After discussing the question of jurisdiction, we therefore turn first to the issues raised with respect to the Sixth Amendment. We then discuss whether dismissal was proper under the Due Process Clause of the Fifth Amendment, which appellees also cited as a basis for relief (App. 13, 15).

I

THE ORDER DISMISSING THE INDICTMENT FOR LACK OF SPEEDY PROSECUTION WAS A DECISION SUSTAINING A MOTION IN BAR DIRECTLY APPEALABLE TO THIS COURT UNDER FORMER 18 U.S.C. 3731

In their response to the government's jurisdictional statement, appellees challenged the statutory authority relied upon by the government for taking an appeal directly to this Court from Judge Hart's dismissal of the indictment. The government based its right of appeal on that part of former 18 U.S.C. 3731 permitting a direct appeal to this Court from a district court's decision in a criminal case "sustaining a motion in bar, when the defendant has not been put in jeopardy." [5] Appellees argue that the dismissal of the indictment for "lack of speedy prosecution" does not constitute the granting of a motion in bar but is a decision premised upon the court's discretionary power under Rule 48(b).

United States v. *Weller,* No. 77, this Term, February 24, 1971, decided after the filing of our jurisdictional statement, makes clear that the phrase "motion in bar" encompasses all pleas in the nature of confession and avoidance, that is, where the defendant did not deny that he had committed the acts charged or that those acts constituted a crime, but nevertheless urged that he could not be prosecuted because

[5] The 1970 amendment to the Criminal Appeals Act, 84 Stat. 1890, is not applicable to the present appeal since by its own terms that amendment does not apply to cases "begun in any district court before [its] effective date," *i.e.*, January 2, 1971. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971, slip op. p. 1, n. 1.

of some extraneous factor, such as the tolling of the statute of limitations or the denial of a speedy trial.

Judge Hart's dismissal, if upheld, permanently bars the government from prosecuting appellees for the offenses alleged in the indictment. If prejudice did result from the government's delay in securing an indictment, that prejudice cannot be cured. Thus, no matter what terminology is applied to the basis for dismissal, see *United States* v. *Goldman,* 277 U.S. 229; *United States* v. *Hark,* 320 U.S. 531, the actual effect is to bar future indictments for the same offenses. This was no mere dismissal without prejudice for failure to prosecute, as might have occurred on the basis of post-indictment delay. See *United States* v. *Ewell,* 383 U.S. 116; *United States* v. *Provoo,* 350 U.S. 857, affirming 17 F.R.D. 183, 203 (D. Md.); *Mann* v. *United States,* 304 F. 2d 394, 397 (CA.D.C.), certiorari denied, 371 U.S. 896. Rather, the order under review was in the most traditional sense a "judgment sustaining a motion in bar."[6]

[6] Judge Hart did not mention Rule 48(b) of the Federal Rules of Criminal Procedure, undoubtedly because that provision has no applicability here. Rule 48(b) allows the court to dismiss an indictment if there is "unnecessary delay in presenting the charge to a grand jury * * * against a defendant who has been held to answer to the district court." But the "delay" here occurred before the appellees had been "held to answer to the district court." See, *e.g., Nickens* v. *United States,* 323 F. 2d 808, 809 (C.A.D.C.), certiorari denied, 379 U.S. 905; *Hanrahan* v. *United States,* 348 F. 2d 363, 366, (C.A.D.C.); *Hoopengarner* v. *United States,* 270 F. 2d 465, 469 (C.A.6); *United States* v. *Kabot,* 185 F. Supp. 159 (S.D.N.Y.), affirmed, 295 F. 2d 848 (C.A. 2), certiorari denied, 369 U.S. 803; 8a Moore, *Federal Practice* 48–12 (Cipes ed. 1970); 6 Orfield, *Criminal Procedure under the Federal Rules* 357 (1967).

II

THE RIGHT OF AN ACCUSED TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT DOES NOT ARISE UNTIL CRIMINAL CHARGES HAVE BEEN BROUGHT

The relatively few speedy trial decisions of this Court have all involved situations where the defendants objected to delays occurring after criminal proceedings had been instituted. *Dickey* v. *Florida,* 398 U.S. 30; *Smith* v. *Hooey,* 393 U.S. 374; *Klopfer* v. *North Carolina,* 386 U.S. 213; *United States* v. *Ewell,* 383 U.S. 116; *Pollard* v. *United States,* 352 U.S. 354; *Beavers* v. *Haubert,* 198 U.S. 77. Here, in contrast, the defendants, who were never arrested, claim that it was the passage of time preceding indictment that deprived them of their right under the Sixth Amendment. In recent years, and with increasing frequency, the courts of appeals have passed on similar claims. Although a few circuits appear to have left the question open, see *Schlinsky* v. *United States,* 379 F. 2d 735 (C.A. 1); *United States* v. *Feinberg,* 383 F. 2d 60 (C.A. 2), most have held that **the Sixth Amendment does not govern the time when** criminal charges must first be brought. See, *e.g., Kroll* v. *United States,* 433 F. 2d 1282 (C.A. 5), certiorari denied, May 5, 1971, No. 1314, this Term, *Hoopengarner* v. *United States,* 270 F. 2d 465 (C.A. 6); *United States* v. *Napue,* 401 F. 2d 107 (C.A. 7), certiorari denied, 393 U.S. 1024; *Terlikowski* v. *United States,* 379 F. 2d 501 (C.A. 8); *Benson* v. *United States,* 402 F. 2d 576 (C.A. 9); *United States* v. *Reed,* 413 F. 2d 338 (C.A. 10), certiorari denied *sub nom. Sartain* v. *United States,* 397 U.S. 954; *Nickens* v. *United States,* 323 F. 2d 808 (C.A. D.C).

The wording of the Sixth Amendment leaves little

doubt: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * * and to be informed of the nature and cause of the accusation * * *." The language could hardly be clearer that only an "accused" in a "criminal prosecution" has a right to a speedy trial, and the natural meaning of "accused" is a person who has been charged with a crime. The Sixth Amendment says nothing about how quickly investigations of criminal activity must culminate in the filing of charges against those suspected, or, indeed, how soon a crime must be detected before the initiation of a criminal prosecution is foreclosed.

The natural meaning of the speedy trial guarantee in the Sixth Amendment is confirmed by its history, much of which is recounted in *Klopfer* v. *North Carolina*, 386 U.S. 213, 223–226. Sir Edward Coke's observation [7] that thirteenth century justices with gaol or oyer and terminer commissions would not suffer a prisoner to be long detained presupposes situations where criminal proceedings had at least begun by way of arrest. 386 U.S. at 224. The Habeas Corpus Act of 1679, 31 Charles II, c. 2, which Blackstone described as "the great bulwark of [the English] constitution," [8] had a similar premise. The Act provided for "more speedy relief of all persons imprisoned for any such criminal or supposed criminal matters" and required that persons jailed for felonies or treason be brought to trial upon their own motion within two terms of

[7] Coke, The Second Part of the Institutes of the Laws of England 43 (Brooke, 5th ed., 1797).

[8] IV Blackstone, *Commentaries on the Laws of England* *438 (Lewis ed. 1897); see also *The Federalist* No. 84 (Hamilton).

court or be discharged on bail. *Id.*, section VII. It is not surprising that the Act nowhere even alludes to delay before arrest. For the "maxim of [English] law has always been 'Nullum tempus occurrit regi,' and as a criminal trial is regarded as an action by the king, it follows that it may be brought at any time." 2 Stephens, *A History of the Criminal Law of England* 1–2 (1883) (setting forth illustrative cases).

In this country, most of the states that ratified the Bill of Rights included speedy trial provisions in their constitutions which either copied or used as a guide the English Habeas Corpus Act.[9] And Article 8 of the Virginia Bill of Rights, doubtless the immediate source of the Sixth Amendment, secured the right to a speedy trial in "criminal prosecutions" where "a man hath a right to demand the cause and nature of his accusation."[10] Thus, both the language used by the framers and the light which history sheds on its intended meaning indicate clearly that the Sixth Amendment's guarantee of a speedy trial was designed to assure that those accused of crimes would have their trial without undue delay, not that those at large would be speedily accused of criminal activity.

It has been suggested, however, that for speedy

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[9] The state constitutions are cited in *Petition of Provoo*, 17 F.R.D. 183, 197 n. 6 (D. Md.), affirmed 350 U.S. 857; see also Cooley, *Constitutional Limitations*, 312 n. 2 (1868).

[10] Article 8 of the Virginia Bill of Rights reads as follows:

"In all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of twelve men * * *."

See Heller, *The Sixth Amendment* 23 (1951).

trial purposes, a person might be deemed an "'accused' once the government has decided to prosecute him and has sufficient evidence to move against him." *Dickey* v. *Florida, supra,* 398 U.S. at 45 n. 8 (Brennan, J., concurring). The record in this case does not reveal when the government decided to prosecute. But the district judge did find that the activities mentioned in the indictment "were known from early 1967 or a matter of common knowledge in late 1967," and, in referring to a three-year "delay," he measured this from 1967 (App. 39). The rule applied below thus appears to be that the right to a speedy trial attaches either (1) whenever the government is deemed to have sufficient evidence to seek an indictment or (2) whenever such evidence becomes a "matter of common knowledge." We cannot agree with either a "decision" or a "sufficient evidence" criterion.

In *United States* v. *Ewell, supra,* 383 U.S. at 120, this Court recognized that the Sixth Amendment's guarantee of a speedy trial is an "important safeguard [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." The first and second of these policies are usually not pertinent when the delay occurs before indictment or arrest. The defendant is free and he has not yet been charged with a crime. This case is no exception. To be sure, articles in the Washington Post implicated the defendants in fraudulent activity, but the newspaper nowhere attributed

any such allegation to the United States Attorney or even mentioned any official indication that they or their company were under investigation.[11] The remedy for accusations by private persons is a civil suit for libel or slander; when the government has made no official charge, there is no logical reason why it should be expected to take any step to "minimize anxiety and concern."

The defendant's ability to mount a defense, the third factor referred to in *Ewell,* may of course be affected by the passage of time before, as well as after indictment or arrest. But the effect of the passage of time on a person's ability to defend himself does not depend on when the government has sufficient evidence to move against a suspect, or even when it decides to proceed. If the prosecutor had no evidence at all the effect would be the same, yet even under the district court's test the Sixth Amendment would not apply in these circumstances because the person could not possibly be characterized as an "accused."

To be sure, if the government earlier had enough evidence to establish probable cause, this might have made possible an earlier indictment or arrest. Given ample resources, most things can be done more rapidly, including even the discovery of evidence to establish probable cause, as well as prosecutorial action on such

[11] If our proposition is accepted that the Sixth Amendment does not come into play until the government takes some overt step to "accuse" an individual, questions may of course arise with respect to what amounts to an accusation. This case does not involve any such question since, as we have noted, the appellees had not been arrested and no official statements of any kind had charged them with criminal activity.

evidence after it has been discovered. But there is no basis for the assumption that once the government possesses this quantum of proof it should be obligated to act. Much more may be needed for the government to satisfy itself that a conviction is feasible or appropriate; indeed, further evidence that comes to light may lead to a decision not to indict. The Court recognized this in *Hoffa* v. *United States*, 385 U.S. 293, 309–310, where the petitioner, relying on *Escobedo* v. *Illinois*, 378 U.S. 478, argued that since he would have had a right to counsel under the Sixth Amendment had the government taken him into custody and charged him with an offense, he should have been entitled to the same right at the moment the government had sufficient evidence to do so. In rejecting this argument, the Court said:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

The same principle applies to indictment as to arrest.

There are further reasons why the fact that the government has enough evidence to seek an indict-

ment should not obligate it to do so at that time. In many cases where there is concurrent federal-state jurisdiction, see, *e.g.*, *Bartkus* v. *Illinois*, 359 U.S. 121, state authorities should have primary responsibility for instituting criminal proceedings. A federal prosecutor may accordingly withhold the filing of charges pending the state's decision whether to act, even though sufficient evidence is already available to support a federal indictment. In regulatory areas, the decision to seek an indictment at a certain time may depend less on the amount of evidence available than on whether methods less stringent than criminal sanctions should be utilized for enforcement.

Moreover, the mere availability of a certain amount of information scarcely means that a case is ready to be presented to a grand jury. Prosecuting authorities cannot be expected to assemble cases bit by bit as each new piece of evidence comes to light, even assuming they are aware of it. They also cannot be expected to keep detailed records of when evidence accumulated to the point of probable or even certain cause to believe a person committed the crime for which he is later indicted. Yet the district court's rule for determining at what point a person becomes an "accused" would require just that.

Of still greater significance, interpreting the Sixth Amendment in this manner would encourage expediency on the part of prosecutors and discourage thoroughness, and would be inconsistent with efforts to effectuate the purposes of the Sixth Amendment by

shortening the period between indictment and trial [12]—a goal that makes thorough precharge preparation all the more essential.

Finally, the inevitable result of judicial inquiry into pre-arrest or pre-indictment delay would be to involve the courts in lengthy hearings to determine matters that are not capable of easy proof. For cases that are not dismissed, which would doubtless be the overwhelming majority, this could only extend the period before trial even further, to the detriment of all concerned. In short, "[t]o recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system." [13] The Sixth Amendment's language should therefore not be stretched to cover the period preceding the formal bringing of charges or arrest.

III

THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT PROVIDES NO BASIS FOR SHORTENING THE LIMITATIONS PERIODS SPECIFIED BY CONGRESS, AND THE COURTS SHOULD NOT ORDINARILY EXERCISE THEIR SUPERVISORY POWERS IN THIS AREA

Many of the considerations mentioned above with respect to the Sixth Amendment militate as well against formulating a general rule for preindictment

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[12] See, *e.g.*, *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* (Jan. 5, 1971), requiring the government to be ready for trial within six months of arrest or indictment, whichever is earlier.

[13] ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Speedy Trial* 23 (Approved Draft 1968).

delay on the basis of the Due Process Clause of the Fifth Amendment. Of course the Due Process Clause is not limited to the rights of an "accused" in a "criminal prosecution" as is the speedy trial guarantee. Nevertheless, a standard regarding prosecution delay before arrest or indictment would still entail all the adverse consequences mentioned above. Lengthy hearings with respect to when the government could have proceeded would be unavoidable since mere passage of time could not be deemed "delay" unless it involved the government's postponing action that could have been taken. And as we have pointed out, the fact that the government could, in retrospect, have acted cannot reasonably be transformed into an absolute requirement that the prosecution should be aborted because the government did not act at the first possible moment.

These difficulties obviously could be avoided by relying on a general standard based simply on the lapse of time between commission of the offense and the filing of charges, without reference to the ability of the prosecution to move earlier. This of course essentially describes the function of a statute of limitations. It is our position that, with narrow exceptions, any prosecution brought within the general time limits reasonably set by Congress is not subject to challenge for delay under the Due Process Clause.[14]

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[14] The courts of appeals have taken varying positions on this question. Some have held that the statute of limitations exclusively controls, see *United States* v. *Grayson*, 416 F. 2d 1073, 1076–1077 (C.A. 5); *Lothridge* v. *United States*, No. 20647, C.A. 6, decided April 29, 1971; *United States* v. *Reed*, 413 F. 2d 338, 340 (C.A. 10). Others have held that due process might

We start with the proposition that "the applicable statute of limitations * * * is usually considered the primary guarantee against bringing overly stale criminal charges," *United States* v. *Ewell,* 383 U.S. 116, 122. Unlike England, where there are relatively few statutes of limitations on criminal prosecutions,[15] in this country there is a "long-standing congressional 'policy of repose.'" *Bridges* v. *United States,* 346 U.S. 209, 215–216. In 1790, Congress enacted a general statute of limitations barring criminal prosecutions of non-capital offenses unless brought within two years of commission of the offense. 1 Stat. 112, 119. The period of limitation was extended to three years in 1876, 19 Stat. 32, and five years in 1954, 68 Stat. 1145, 18 U.S.C. 3282. The latter statute is applicable to this case and does not bar this prosecution since the indictment was returned within less than five years. There is no reason to believe that the general five-year limitations period is inherently unreasonable, and there are no special circumstances suggesting that due process required a shorter period in this case.

Foremost among the policies underlying the federal statutes of limitations is Congress' desire to protect

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be denied in extraordinary circumstances, see, *e.g.*, *Schlinsky* v. *United States*, 379 F. 2d 735, 737 (C.A. 1) (relief might be available if there is a showing of "actual prejudice" and "improper motivation" for delaying); *Terlikowski* v. *United States*, 379 F. 2d 501, 505 (C.A. 8) (due process denied if the government "deliberately utilized delay to strengthen its position by weakening that of the defense"); *Benson* v. *United States*, 402 F. 2d 576, 580 (C.A. 9) (requiring "special circumstances"); compare *United States* v. *Napue*, 401 F. 2d 107, 114 (C.A. 7).

[15] Note, *The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution*, 102 U. Pa. L. Rev. 630 (1954).

persons from having to defend charges of long-past misconduct. The statute also exerts time-pressure on law enforcement officials to discover law-violators and bring them to justice.[16] As against these policies, there is the danger that a period of limitations, particularly a relatively short one, may lessen the deterrent force of the criminal law by allowing the guilty to escape prosecution and may also prevent confinement of dangerous offenders.

The limitations period chosen reflects a congressional balancing of these considerations. Judicial scrutiny of pre-indictment or pre-arrest delay under the Due Process Clause, as this Court has interpreted that constitutional provision, see *In re Winship,* 397 U.S. 358; but see *id.* at 377 (Black, J. dissenting), would involve the courts in the same process. Whether the delay before indictment or arrest were judged in light of "fundamental fairness," *Duncan* v. *Louisiana,* 391 U.S. 145, 171, 186–187 (Harlan, J., dissenting), or the "community's sense of fair play and decency," *Rochin* v. *California,* 342 U.S. 165, 173, the courts would have to weigh the same factors that underlay Congress' decision in 18 U.S.C. 3282 to allow prosecutions to be brought within five years after the offense. "Such legislative judgments are clearly entitled to great weight in determining what constitutes unreasonable delay." *Dickey* v. *Florida,* 398 U.S. 30, 47 (Brennan, J., concurring). And with respect to pros-

[16] In addition, the statute may provide an opportunity for self-rehabilitation by offering security from prosecution when the limitation period has run; if the offender has not reformed, he can be indicted for his more recent offenses.

ecutions governed by 18 U.S.C. 3282, we submit that due process of law is not denied when the time limits prescribed by Congress are observed.

We recognize of course that a statute of limitations is a general standard and that, in contrast, the Due Process Clause could serve as a basis for rendering judgments about the particular circumstances in each individual case. There are, to be sure, particular instances where the passage of time between commission of the offense and indictment may have exceptionally lessened the defendant's ability to defend. But even if due process of law meant, which it surely does not, that an indictment must be dismissed for any delay whatsoever, the possibility that memories dimmed or records disappeared would still remain in cases where the government acted with utmost dispatch. The risk is inherent in any system of criminal justice and while it might be reduced by a case-by-case approach under the Due Process Clause, the possibility of accomplishing some good is clearly outweighed by the other factors we have mentioned above, *supra* pp. 20–23, not the least of which are the overriding substantive difficulties and procedural delays involved in determining when the government should have moved against each potential defendant.

In arguing that due process is not denied when a prosecution is begun within the applicable period of limitations, we do not ignore the problem that would be presented if a prosecutor intentionally delayed the start of criminal proceedings for the purpose of impairing the potential defendant's ability to defend. We are aware of no such cases, but whether a court acted

on the basis of the Due Process Clause or its supervisory power, that kind of tactic surely would not and should not be tolerated.[17] The focus in such a situation should not be on the delay as such, but on the prosecutorial overreaching it reflects. We also do not deal here with cases where there is no applicable statute limiting the time for prosecutions since [18] that is not the situation in this case.

Moreover there are no circumstances presented here that would justify promulgating a special rule on the basis of this Court's supervisory power, as the United States Court of Appeals for the District of Columbia did with respect to a particular type of narcotics investigation routinely conducted by the Metropolitan Police. *Ross* v. *United States*, 349 F. 2d 210 (C.A. D.C.). In *Ross*, the court held that even though the defendant had been charged well within the statute of limitations, the delay of seven months between the alleged commission of the offense and the swearing out of the complaint required reversal of his subsequent conviction. The court based its decision on a number of special factors: (1) the defendant was charged with a narcotics violation arising from a single transaction with an undercover agent of the Metropolitan Police; (2) his conviction was based solely on the agent's

[17] Compare *Acree* v. *United States*, 418 F. 2d 427, 430 (C.A. 10) (relief might be granted if the facts "demonstrate a delay with a sinister purpose"); *Terlikowski* v. *United States*, 379 F. 2d 501, 505 (C.A. 8) (due process would be denied if the government "deliberately utilized delay to strengthen its position by weakening that of the defense").

[18] For capital offenses Congress has set no time limit for when an indictment may be found. 18 U.S.C. 3281.

testimony; (3) the agent had been involved in numerous narcotics transactions and needed the aid of his notebook to testify about his short encounter with the defendant; (4) the only reason for the delay of seven months before charging the defendant was a desire not to disclose the agent's identity until his undercover work had ceased; and (5) the defendant had only a limited education and experienced difficulty in remembering events even in the recent past, as did one of his witnesses. Thus, the court held that "in this very narrow and specialized class of narcotics cases" a "due regard for [the court's] supervisory responsibility" called for relief. 349 F. 2d at 215–216. Subsequent cases have confirmed that *Ross* is limited to the particular circumstances there presented,[19] which are in no way analogous to those here and indeed could be assessed only after a trial.

[19] See *e.g.*, *Bey* v. *United States*, 350 F. 2d 467 (C.A. D.C.), also a narcotics case, distinguishing *Ross* on the ground that there was more than one transaction and each involved a lengthy confrontation with a trained undercover agent of the Federal Bureau of Narcotics; *Daniels* v. *United States*, 357 F. 2d 587 (C.A. D.C.), another narcotics case, where both the majority and dissent distinguished *Ross* on the ground that there was corroboration for the agent's testimony and because the "risk of conviction of an innocent person—the basic concern of the Narcotics Delay cases—was no greater here than in the ordinary criminal cases," *id.* at 590 (Bazelon, C.J., concurring on this point, but dissenting on other grounds).

IV

EVEN IF JUDICIAL EXAMINATION OF PRE-INDICTMENT DELAY WERE APPROPRIATE, RELIEF SHOULD NOT BE GIVEN WITHOUT A SHOWING OF ACTUAL PREJUDICE, WHICH HAS NOT BEEN MADE IN THIS CASE

A

For the reasons given, we think it clear that the Sixth Amendment does not apply to the period before charges are brought, and that it is inappropriate to apply constitutional due process principles to delay as such (absent clear prosecutorial abuse). Nor should the courts substitute their supervisory powers for the judgment Congress has made unless an unusual situation is presented. But even if there were to be judicial consideration of the time lapse before charges were brought in a particular case, we urge that the only sound basis for granting relief from a delayed indictment should be a particularized showing of exceptional prejudice to the defense.

The drastic step of dismissing a criminal prosecution that has been instituted within the statute of limitations can, in our view, only be justified if the court has determined that the injury to the defendant outweighs the public interest in trying him for the offenses charged. In the absence of a showing of actual harm to the defendant from the delay, the balance is quite clearly in favor of allowing the prosecution to proceed. In cases involving delay between indictment and trial, the Court has required the defendant to show that he has thereby been prejudiced. See *United States* v. *Ewell,* 383 U.S. 116, 120, 122;

Dickey v. *Florida*, 398 U.S. 30, 36–38; see also *United States ex rel. Solomon* v. *Mancusi*, 412 F. 2d 88 (C.A. 2), certiorari denied, 396 U.S. 936. Particularly since potential defendants are not imprisoned and are not under the shadow of public accusation, the Court should require at least as much when the claim for relief is based on pre-indictment delay.

In addition, the accused should have the burden of showing prejudice. He will know whether potential witnesses have disappeared or whether records have been lost, and he will also know how these would have been material to his defense. These are matters not necessarily known to the government. Moreover, to require the government to show lack of prejudice would impose upon it the unrealistic task of predicting possible defenses and the variety of ways these could be presented and of then showing that no significant evidence that might have been available to support these defenses was lost. In seeking the extraordinary remedy of having the indictment dismissed, the accused therefore should carry the burden of proving specific prejudice.

Factors other than prejudice might, of course, become relevant if there were to be such judicial examination of pre-indictment delay. If the delay in bringing charges is not in fact attributable to the government (but rather, for example, to identifiable defense efforts to impede the investigation), the issue of prejudice would not be reached. And when the delay is chargeable to the government, the government should be allowed to show countervailing reasons why an indictment should not be dismissed even when there is

a certain amount of prejudice to the defendant; that is, there should be a balancing of the justification for a delay against the resulting prejudice. For example, if the government shows that it needed the time for the investigation of an unusually complex case, or to verify the appropriateness of proceeding, or to identify other persons directly involved in an illegal scheme, we would urge that a higher standard of prejudice should be required than in a case of unexplained delay. And obviously the length of the delay would be an element in any such assessment of reasonableness as well as in the assessment of prejudice.

B

It is evident that the indictment in this case was improperly dismissed if, as we have contended, the courts should not examine preindictment delay not exceeding the limitations period. There is no suggestion here of deliberate or oppressive conduct on the part of the government. See *Pollard* v. *United States*, 352 U.S. 354, 361. The most that can be said is that an inadequate work force and the need to use available manpower to move forward with cases commanding a higher priority prevented more expeditious handling of the matter. Thus, this must be treated as a case of delay which—though perhaps chargeable to the government—has none of the elements that might give rise to a due process claim. Nor are there special circumstances here appealing to the exercise of supervisory power.

Even if this kind of pre-indictment delay is appropriate for judicial examination, there has been no

showing that this is a case where relief was warranted.

In the first place, it is not clear in this case how much of the time should be regarded as unjustified delay. The particular offenses charged in the indictment allegedly occurred between September 1965 and January 1966; the indictment was filed on April 21, 1970, a little more than four years after the last act charged. Exactly how much earlier than April 1970 the prosecution against appellees could have been initiated has never been determined. Newspaper articles appearing in the Washington Post in September and October 1967 disclosed the fraudulent practices of certain home improvement companies, including appellees', and reported that a two-man task force in the United States Attorney's office had been assigned to investigate (App. 27). The district judge's conclusion that the government had sufficient information to commence prosecution in late 1967 is based solely upon the newspaper stories. But newspaper reporters do not necessarily follow probable cause standards.[20] Appellees' files, which had to be examined thoroughly before any action could be taken, were not obtained by government investigators until early 1969 (App. 31–32,

[20] At the hearing before Judge Hart, government counsel did not agree that the substantive allegations of the newspaper articles were true. The United States Attorney at the time of the disclosures by the Washington Post, who was quoted as indicating that a grand jury sworn on October 9, 1967, would investigate, was no longer in office at the time appellees were actually indicted.

34)[21] and there is no indication that they could have been secured earlier.

In any event, even assuming that the government is chargeable with an unjustified delay after 1967, there is no showing of real prejudice here. As in *United States* v. *Ewell, supra*, 383 U.S. at 122, "the appellees' claim of possible prejudice in defending themselves is insubstantial, speculative, and premature. They mention no specific evidence which has actually disappeared or has been lost, no witnesses who are known to have disappeared."

Appellees undoubtedly knew or should have known that they were under criminal investigation long before they were summoned for a grand jury appearance, since their files had been transmitted to the United States Attorney's Office sometime between the summer of 1968 and January 1969. Moreover, the government disclosed that its case was based essentially on documentary evidence. In *Tynan* v. *United States*, 376 F. 2d 761 (C.A. D.C.), certiorari denied, 389 U.S. 845, a speedy trial claim was rejected in a case involving multiple counts of mail fraud; the Court found clear distinctions between the problems of proof in the defense of a narcotics prosecution (*Ross, supra* p. 27) and a mail fraud trial. In the latter the "nature of the Government's proof in support of the several counts of the indictment is not of the nature that is blurred, obscured, dissipated, or destroyed by the passage of the period of time involved in this case. The transactions involving individual witnesses are generally

[21] Or, according to appellee Marion, the summer of 1968 (App. 31–32, 34).

unique in their experience, and where documentary evidence is accepted, it, by its very nature, retains its reliability." 376 F. 2d at 763.

The loss of relevant proof in the present case is especially unlikely in view of the fact that during the pre-indictment period the appellees were continuously engaged in the defense of a number of civil actions involving the same subject matter as the criminal charges (see p. 7 *supra*). At least two of these civil actions involve appellees' dealings with victims named in the indictment (note 2 *supra*).

This case is an apt illustration of the dangers that lie in an expansive interpretation of claims of denial of a speedy trial with respect to the period between offense and the beginning of criminal proceedings. Within the period of limitations appellees have been charged with gross fraud upon unsuspecting and unprotected members of the public. Under the district court's order they are allowed to go free without trial because—at most—some prosecutor or investigator might have been more diligent. This result is reached in a case where documentary evidence, unaffected by the passage of time, will be a major part of the proof and where the appellees have made no showing of any loss of witnesses or actual harm. Dismissal in this case would in no way aid the interests of justice.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be reversed and the indictment ordered reinstated.

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IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA, *Appellant*

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH, *Appellees*

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR THE APPELLEE WILLIAM R. MARION

QUESTIONS PRESENTED

The appellee William R. Marion adopts the Government's statement of Question 1. He restates Questions 2.-4. as follows:

2. Whether the dismissal of the indictment represented an abuse of the District Court's discretion to dismiss an indictment for want of prosecution or for unnecessary delay in presenting the charge to a grand jury under F.R.Crim.P. 48(b).

3. Whether the Sixth Amendment's guarantee of a speedy trial obtains before the indictment is filed.

4. Whether formal proof of purposeful or oppressive Government motive or prejudice other than loss

of the accused's own memory are conditions to dismissal of an indictment for failure to afford a speedy trial.

COUNTERSTATEMENT

The indictment, filed April 21, 1970, charged that, from approximately mid-March of 1965 until early 1967,[1] a period of nearly 23 months, the appellee William R. Marion and the co-appellee Samuel C. Cratch controlled a corporation known as Allied Enterprizes, Inc., engaged in the business of selling home intercom and alarm systems on credit to homeowners in the Washington, D. C., metropolitan area. The deferred portion of the purchase price for each system was usually secured by a junior mortgage on the customer's home, and customers were asked to participate in a referral plan by which they received money payments from Allied Enterprizes, Inc., for new purchasers of Allied's product solicited by them. As conducted, the business was said to have involved mail and wire fraud and the interstate transportation of false securities. (App. 2-5).

In December of 1966, the Federal Trade Commission began an investigation of the business practices of Allied Enterprizes, Inc., and, finding some of them objectionable, issued an initial cease-and-desist order (by default) on February 6, 1967, and a final order on April 11, 1967. Allied Enterprizes, Inc., conducted no business after February 6, 1967. (Exhibit A to Motion to Dismiss Indictment; App. 23).

Beginning September 1, 1967, and continuing at intervals through October 11, 1967, *The Washington*

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[1] The last event charged as a part of the "fraud" is alleged to have occurred January 19, 1966 (App. 11).

Post newspaper printed a series of articles, some appearing on its front page, exposing the allegedly illegal activities of various business firms in obtaining junior mortgages to secure their customers' indebtedness for the credit purchase of home improvement materials and services.[2] The articles asserted, *inter alia,* that the companies were then being investigated by United States Postal Inspectors, the FHA, the FTC, and the Justice Department; that the U.S. Attorney's office had begun receiving complaints about them more than two years earlier; that on March 30 [of 1967] "Federal investigators" had delivered a "lengthy" report to the U.S. Attorney; that the U.S. Attorney had set up a "special fraud squad" in July [of 1967]; that a Justice Department "specialist on frauds" had been assigned to assist in presenting evidence to a grand jury which had been sworn in [on October 9, 1967]; that the Assistant U.S. Attorney in charge of the "fraud squad," Seymour Glanzer, had been relieved of other duties to enable him to concentrate on the case; and that the U.S. Attorney expected indictments "within two weeks." (Exhibits B-H, J-L, to Motion to Dismiss Indictment; App. 25-28)[3]

The articles were accompanied by editorials on October 6 and 16, 1967, entitled, respectively, "Despicable

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[2] At oral argument, counsel for the Government stipulated to the authenticity of the articles but not to the truth of their contents. (App. 35). The Government has at no time, however, disputed the accuracy of the quotations and statements attributed to the then U.S. Attorney for the District of Columbia.

[3] Appellee's company, Allied Enterprizes, Inc., and appellee Marion, were both mentioned by name in the article appearing on page A-1 of the Wednesday, October 4, 1967, edition of the *Post,* entitled "Intercom Buyers Expected Prizes but Got Mortgages." (Exhibit F, Motion to Dismiss Indictment).

Racket" and "Crimes Against the Poor." (Exhibits I, M, to Motion to Dismiss Indictment).

Sometime between the "summer of 1968" (according to appellee Marion) and "January of 1969" (according to the Government) Marion delivered all of the records of Allied Enterprizes, Inc., to Assistant U.S. Attorneys Seymour Glanzer and Sandor Frankel, and discussed his activities with them in detail. (App. 13, 31, 34). The records have remained in custody of the U.S. Attorney's Office since that time. (App. 31, 34).

Thereafter, appellee Marion, who was neither arrested nor formally charged at any time prior to indictment, was told nothing whatsoever as to what disposition was to be made of the accusations against him until he was advised that a subpoena had been issued to compel his presence before a grand jury (sworn in the previous September) on March 16, 1970. (App. 13).

The indictment of April 21, 1970, drawn in 19 counts, charged the appellee Marion, as both principal and aider-and-abettor, with mail fraud, wire fraud, and interstate transportation of false securities against 21 victims alleged by name, and "divers other persons," between March 15, 1965, and February 6, 1967. (App. 2-11).

At his arraignment April 29, 1970, Marion entered a plea of Not Guilty to all counts. His Motion to Dismiss was filed May 5, 1970, heard and granted by District Judge George L. Hart, Jr., on June 8, 1970, and the indictment ordered dismissed as to both defendants. (App. 40). From that Order this appeal by the Government is taken.

SUMMARY OF ARGUMENT

I. The dismissal of the indictment for lack of speedy prosecution did not sustain a "motion in bar" as defined by this Court under former 18 U.S.C., § 3731, because the dismissal did not "bar" subsequent prosecution for the same events, is not a ruling contemplated by the Criminal Appeals Act to have required direct review by this Court, and was essentially a discretionary dismissal of which review by this Court would not be consistent with its own narrow construction of its appellate jurisdiction of appeals by the Government in criminal prosecutions terminating favorably to the accused.

II. The dismissal of the indictment was a discretionary dismissal for want of prosecution or for unnecessary delay in presenting the charge to the grand jury under Rule 41(b), F.R.Crim.P., and the District Judge did not abuse his discretion in dismissing an indictment filed more than three years after the Government learned of the alleged crime and the circumstances of its commission, and the identity of the defendant.

III. The dismissal of the indictment for failure to afford the accused his right to a speedy trial under the Sixth Amendment was consistent with purposes for which the right exists, viz., to protect the accused against the anxiety occasioned by accusations of crime and the possibility of an unfair trial on stale charges, to induce the Government to proceed with orderly expedition in bringing criminal charges to trial, and to secure for society the objectives of the criminal process of punishment, deterrence, and rehabilitation. Notwithstanding the delay occurs prior to the formal filing of the indictment, reason and authority require the

Sixth Amendment right to a speedy trial to prohibit unnecessary delay in acting upon accusations of crime at all stages of the process, independently of the statute of limitations. Neither Governmental malice nor loss of specific evidence need be formally proved as a condition to relief from such unnecessary delay.

ARGUMENT

I. THE RULING OF THE DISTRICT JUDGE MAY NOT BE APPEALED DIRECTLY TO THIS COURT

The Order Granting Appellee's Motion To Dismiss the Indictment Did Not Sustain a "Motion in Bar" Under Former Title 18, U.S.C., § 3731

The Court has held that it possesses appellate jurisdiction only to the extent conferred by statute, and in criminal cases upon appeals by the Government the statute will be strictly construed. *Carroll* v. *United States,* 354 U.S. 394 (1957). Not only does such an appeal "offend the policies behind the double-jeopardy prohibition," but when taken prior to trial in a pending case further delays any subsequent proceedings required. *Will* v. *United States,* 389 U.S. 90, at 96 (1967).

The policy sought to be implemented by the former direct-review provision of the Criminal Appeals Act contemplated prompt, final, and universally-binding resolution of controversial rulings purporting to decide broad questions of law which, as precedents, might impair the Government's ability to prosecute other cases. See *United States* v. *Mersky,* 361 U.S. 431, at 434-436 (1960); Harlan, J., dissenting in *United States* v. *Vuitch,* 402 U.S. 62, [28 L.ed. 2d 601, at 616-618] (1971). The District Judge in the instant case made no such ruling. Upon a unique state of facts "in this case," (App. 39), he held simply that the Government,

having knowledge of an alleged crime, the identity of the persons alleged to have committed it, and all of the details of its commission, for its own reasons dallied too long in beginning the process of bringing the defendants to trial.

The Government contends *United States* v. *Weller,* 401 U.S. 254 (1971) is conclusive of the Court's jurisdiction to entertain this appeal. Its import, however, is, if anything, to the contrary. In *Weller,* this Court remanded the appeal to the Court of Appeals, holding itself without jurisdiction to pass upon the Government's direct appeal from the dismissal of an indictment on non-constitutional grounds, deciding once more on analogy to the rules of common law pleading that the particular ground of dismissal was not equivalent to a "plea in bar." In *Weller,* although the appellee's motion to dismiss had been based upon the constitutional ground of the Fifth Amendment, the indictment was dismissed on the nonconstitutional ground that the offending regulation was not authorized by the enabling statute. As had the appellee in *Weller,* the appellee Marion in the instant case moved to dismiss on Fifth and Sixth Amendment grounds, but the District Judge did not purport to rule on constitutional grounds. Both Weller and Marion (by his plea of Not Guilty) maintained, moreover, that their respective acts were "simply not a crime." *Id.,* at 260.

Thus, because *Weller,* is *not* dispositive, as it did in *Weller* and in its precedents, the Court must look beyond the pleadings in this case to "the effect of the ruling sought to be reviewed." Only if the effect is "to end the cause and exculpate the defendant" may it be treated as a "bar" to the prosecution and, thus, appealable to the Court. *United States* v. *Hark,* 320 U.S. 531,

at 536 (1944); *United States* v. *Blue,* 384 U.S. 251 (1966).

Dismissals for want of prosecution have historically not been regarded as a "bar" to subsequent prosecution for the same events. *Cohen* v. *United States,* 366 F.2d 363 (9th Cir. 1966); *United States* v. *Apex Distributing Company,* 270 F.2d 747 (9th Cir. 1959); *Mann* v. *United States,* 304 F.2d 394 (D.C. Cir. 1962); *Ex parte Altman,* 34 F.Supp. 106 (D.S.D. Cal. 1940); *Annot.,* 50 A.L.R. 2d 943 (1956). Cf. *United States* v. *Cadarr,* 197 U.S. 475 (1905). Nor does the Government's practical inability or unwillingness to complete the prosecution under the conditions of the order from which it seeks to appeal for that reason alone render it a decision subject to direct review by this Court. *Carroll* v. *United States,* 354 U.S. 394 (1957); *United States* v. *Sweet,* 399 U.S. 517 (1970). Cf. *United States* v. *Sisson,* 399 U.S. 267 (1970). Indeed, such an order may not be appealable at all. *United States* v. *Hester,* 325 F.2d 654 (9th Cir. (1963); *United States* v. *Apex Distributing Company, supra.*

On the other hand, at least one Court of Appeals has presumed its jurisdiction of such an appeal (and the statute, of course, provided for mutually exclusive rather than concurrent jurisdiction in this Court and the circuit courts of appeal). *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947).

In ruling upon appellee Marion's Motion to Dismiss, the District Judge, after summarizing the chronology of the alleged offenses and the common community knowledge of them, of the Government's desultory response, he said:

> "The Court, therefore, views that there has been a lack of speedy prosecution *in this case,* and will

grant the Motion to dismiss." (App. 39) (Emphasis supplied).

His decision, in terms, therefore, was limited to "this case." It made no reference to the Constitution, nor did it purport to find some other "extraneous factor," such as the statute of limitations or immunity, an insuperable obstacle to prosecution. It appears, therefore, to have been based entirely upon Rule 48(b), F.R.Crim.P., which, in unambiguous language, declares the universal, traditional, and inherent discretionary power of a court to dismiss an indictment if there has been "unnecessary delay in presenting the charge to a grand jury . . ." once the defendant has been "held to answer" in the District Court.

This Court has not, to date, held such a purely discretionary ruling appealable to this Court rather than to the appropriate circuit court of appeals under the former 18 U.S.C., § 3731. To allow a direct appeal of such ruling to this Court would not only fail to fulfill the legislative objective of the Criminal Appeals Act but would attenuate the principle of the restrictive construction of the Court's appellate jurisdiction to the point of rendering virtually every discretionary dismissal of an indictment by a trial judge susceptible of direct review here.

II. THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION IN DISMISSING THE INDICTMENT FOR UNNECESSARY DELAY IN PRESENTING THE CHARGE TO A GRAND JURY

The Accusations of Crime and the Identity of the Accused Were Common Knowledge in the Community, and the Defendant's Records in the Possession of the Government, Several Years Before the Indictment Was Filed

The power of a trial court to dismiss an action for want of prosecution is a discretionary power of "ancient origin." *Link* v. *Wabash R. Co.*, 370 U.S. 626, at 630 (1962). It has ". . . generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Id.*, at 630-631. Rule 48(b), F.R.Crim.P., is a ". . . restatement of the inherent power of the court to dismiss a [criminal] case for want of prosecution." *Notes of Advisory Committee on Rules,* Rule 48(b). See 8A *Moore's Federal Practice* § 48.03[1] (Cipes ed. 1970). The exercise of a discretionary power by a trial court is subject to review on appeal only for an abuse of that discretion. *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R. Co.*, 363 U.S. 528, (1960); *United States* v. *DeLeo,* 422 F.2d 487, at 495 (1st Cir. 1970), certiorari denied 397 U.S. 1037 (1970), and the scope of review limited to determining that the decision not have been "arbitrary, fanciful, or clearly unreasonable," *United States* v. *McWilliams,* 163 F.2d 695, at 697 (1947), taking "account of the law and the particular circumstances of the case and . . . directed by the reason and conscience of the judge to a just result." *Burns* v. *United States,* 287 U.S. 216, at 222-223 (1932).

Disregarding altogether the accuracy of the newspaper articles appearing in early October 1967, it is

undisputed that, by February 6, 1967, the Federal Trade Commission had completed its investigation and prosecuted to a successful conclusion its own proceedings to terminate what it deemed to be the appellee's unlawful business activity. It is further undisputed that the articles, in fact, were published in a daily newspaper of general circulation in the Washington, D. C., metropolitan area, with the appellee named by name and his alleged crime described in detail to the community at large, together with editorial exhortations to his prompt punishment. Finally, it is undisputed that, sometime during the ensuing two years, appellee not only voluntarily delivered all of his business records to the Assistant United States Attorney in charge of the case, but also, without compulsion, discussed his business activities with them.

The indictment was not returned until April 21, 1970.

The Government's unelaborated explanation attributed the delay in its presentation to the grand jury to insufficient personnel to work on such cases of relatively low priority. (App. 35; Jurisdictional Statement, 7). In the circumstances, it can hardly be said to be "arbitrary, fanciful, or clearly unreasonable" to find a delay of over three years in presenting the charge to a grand jury unnecessary.

III. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL SHOULD ATTACH AND OBTAIN THROUGHOUT THE CONTINUUM OF CRIMINAL LAW ENFORCEMENT FROM OFFENSE TO COMPLETION OF PUNISHMENT

An Accused Should Be Tried, Subject to the Requirements of Ordered Expedition, Within a Reasonable Time After the Government Discovers, or Should Have Discovered in the Exercise of Due Diligence, That a Crime Has Been Committed by Him

Notwithstanding its early and eminent origins, the history of the right to a speedy trial has not been well-documented, nor have its dimensions been fixed with precision. Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 483-485 (1968); Brennan, J., concurring in *Dickey* v. *Florida,* 398 U.S. 30, at 40 (1970). Nevertheless, in tracing its lineage to the Magna Carta (1215), Chief Justice Warren said in *Klopfer* v. *North Carolina,* 386 U.S. 213, at 223 (1967):

> "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage."

Its purposes include the prevention of unnecessary incarceration prior to trial, the minimization of anxiety and concern accompanying public accusation, and the limitation of the possibilities that long delay will impair the ability of an accused to defend himself. *United States* v. *Ewell,* 383 U.S. 116, at 120 (1966). Even in the absence of physical restraint, an impending prosecution may subject the potential defendant to public scorn, deprive him of employment, and curtail his speech, association, and participation in unpopular causes. *Klopfer* v. *North Carolina, supra,* at 221-222.

Prompt disposition of accusations of criminal conduct is important to accused, accuser, and society at

large, for all of the reasons justifying the existence of the criminal law itself—punishment, deterrence, and rehabilitation. As time elapses from the moment an alleged offense takes place, the objectives of the criminal process become increasingly difficult to attain. For the accused who is innocent, or believes himself wrongly accused, the most important practical consequence of the passage of time is the attrition of his ability to respond to the accusation. And for the accused who is oblivious of the state's purpose to try him for the acts of which he is accused, the effect is exacerbated by his inattention to the necessity of preserving the evidence to do so. The ministerial formality of the filing of the indictment or information merely serves as notice to him that he must attempt to reassemble what may already have been irretrievably lost. Even an awareness that he is "under investigation," which perhaps produces more anxiety than a known and pending charge, does not apprise an accused of the crime he is suspected of committing or the identity of his accuser.

The Government correctly observes (Br. 15), however, that a majority of the circuit courts of appeal has applied the conventional rule, apparently first expressed in *D'Aquino* v. *United States,* 192 F.2d 338, at 350 (9th Cir. 1951), that the right to a speedy trial does not arise until "... a formal complaint is lodged against the defendant in a criminal case," and that as to the interval following the commission of an alleged offense until an indictment or information is filed, the statute of limitations exclusively delimits the time during which the accused is exposed to prosecution. See *Nickens* v. *United States,* 323 F.2d 808 (D.C. Cir. 1963), certiorari denied 379 U.S. 905 (1964); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959).

This Court has not approved the conventional rule, which has encountered both judicial and academic criticism, e.g., Rives, J., concurring in *Harlow* v. *United States,* 301 F.2d 361, at 375 (5th Cir. 1962); Wright, J., concurring in *Nickens* v. *United States,* 323 F.2d 808, at 812-813 (D.C. Cir. 1963); Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 488-490 (1968); Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1613-1615 (1965). See *American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial,* at 22 (Approved Draft 1968). Moreover, before the conventional rule developed currency, lower courts proceeded on the unexpressed assumption that pre-indictment delay should be included in computing the interval during which the right to a speedy trial obtained, *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956); *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), aff'd. 350 U.S. 857 (1955), and aversion to Fabian investigations of complaints of crime seems to have been very much a part of the "English law heritage" of the right to a speedy trial. See *King* v. *Robinson,* (1765) 96 E.R. 313 (Lord Mansfield, C.J.); Alderson, B., in *Queen* v. *Robins,* (1844), 1 Cox C.C. 114, at 114.

Nevertheless, when the statute of limitations became acknowledged as the measure of the uncharged suspect's right to expedite disposition of accusations made against him, the District of Columbia Circuit Court of Appeals held, in the circumstances of one case, a pre-indictment delay of seven months to violate the right to due process under the Fifth Amendment. *Ross* v. *United States,* 349 F.2d 210 (D.C. Cir. 1965). Due process reasoning to reach the same result solely because the unconscionable delay occurs prior to indict-

ment, however, has been criticized as a misapplication of "typical speedy trial criteria." Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1616 (1965); Note, *Effective Guaranty of a Speedy Trial for Convicts in other Jurisdictions,* 77 Yale L.J. 767, at 783 (1968).

The Bill of Rights imposes restraints upon the power of the Federal government generally, not merely the judicial branch. *Ex parte Wilson,* 114 U.S. 417, at 426 (1885). It is for the Court, therefore, to decide whether the Sixth Amendment shall encompass pre-indictment delay within the protection of the right to a speedy trial, and, if so, whether its dimensions coincide in all cases with the period of limitations prescribed by Congress.[4] There is, of course, no statute of limitations for capital crimes, 18 U.S.C., § 3281. Yet persons accused of capital crimes are certainly entitled to a speedy trial. *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), aff'd, 350 U.S. 857 (1955).

It is during the pre-indictment stage of the criminal process that both the accused and the Court have the least control over both the character of the inquisition

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[4] The statute of limitations on non-capital crimes (18 U.S.C., § 3282) in effect from 1876 (19 Stat. 32) to 1954 was perfunctorily amended in that year to increase the period from three to five years by an unrelated amendment to a House of Representatives bill to deny annuities to government employees convicted of certain offenses. 1 *U.S. Code Cong. & Ad. News* 1351, at 1355 (1954). The House bill (H.R. 9909) was amended in the Senate, apparently at the "urgent request" of the Department of Justice for more time to detect and prosecute corrupt public officials. 100 Cong. Rec. 14781 (1954) (remarks of Sen. Williams). The effect of the amendment, however, was not confined to crimes of public officials.

and the pace at which it proceeds. The accused has no right at this stage to know the names of his accusers, *Scher* v. *United States,* 305 U.S. 251 (1938); 18 U.S.C., § 3432, or the information reported by them. 18 U.S.C., § 3500. The proceedings before the grand jury occur entirely without the participation or even the observation of an accused. Only attorneys for the Government are present. Rule 6(d), F.R.Crim.P. And even if the grand jury indicts, it is ultimately left entirely to the discretion of the United States Attorney as to who shall be prosecuted, when, and for what crimes. *United States* v. *Thompson,* 251 U.S. 407 (1920); *Goldberg* v. *Hoffman,* 225 F.2d 463 (7th Cir. 1955); *Newman* v. *United States,* 382 F.2d 479 (D.C. Cir. 1967). The accused cannot compel the government to take him into custody at his convenience, *Hoffa* v. *United States,* 385 U.S. 293 (1966), and thus force the attachment of his post-arrest rights. *Hedgepeth* v. *United States,* 364 F.2d 684 (D.C. Cir. 1966). He may not, even after indictment, be able to learn what took place during the period he was "under investigation," either as a matter of right, see *United States* v. *Augenblick,* 393 U.S. 348 (1969), or in practice. See *United States* v. *Bryant* (App. Nos. 23,957 and 24,105, D.C. Cir. decided January 29, 1971). Cf. *United States* v. *Wade,* 388 U.S. 218 (1967).

In sum, the period between the complaint of an accuser to the prosecuting authorities and the filing of the indictment is the interval in which the accused is least able to hasten the inquiry or affect the result, and the latitude for official procrastination (and corruption) most extensive. See, generally, Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice,* 69

Yale L.J. 543 (1960); McIntyre and Lippman, *Prosecutors and Early Disposition of Felony Cases,* 56 A.B.A.J. 1154 (1970).

Scholars have recommended, some states and Federal circuits have implemented, and Congress is considering legislation to establish fixed periods within which, following arrest or indictment, a defendant must be put on trial. Note, *The Lagging Right to a Speedy Trial,* 51 Va. L.Rev. 1587, at 1620 (1965); *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* (1971); *Hedgepeth* v. *United States,* 364 F.2d 684, at 686 (D.C. Cir. 1966); Title I, S.895, *The Speedy Trial Act of 1971.* For purposes served by the Sixth Amendment right to speedy trial, however, such rules will be utterly vitiated should the Government be allowed to continue to prepare its cases as it presently does, clandestinely and at its leisure, during the entire five-year hiatus of the period of limitations, and, after indictment, precipitate unprepared defendants to trial in the sanctified cause of speedy justice.

The Government argues that the word "accused" means one formally "charged" with a crime (Br. 16)—in other words, one who has, in fact, become a *defendant.* The Sixth Amendment, however, in terms, speaks of the rights an *accused* shall enjoy. Holding a propinquitous Sixth Amendment right (to the assistance of counsel) to attach when ". . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect. . .", *Escobedo* v. *Illinois,* 378 U.S. 478, at 490-491 (1964) (but see Stewart, J., dissenting, *id.,* at 493-494), the Court said:

> "It would exalt form over substance to make the right to counsel, under these circumstances, depend

> on whether at the time of the interrogation, the authorities had secured a formal indictment." *Escobedo* v. *Illinois,* 378 U.S. 478, at 486.

This Court, moreover, has not limited the concept of a "charge" of crime to the indictment or information. In construing the word as used in the Constitution, Article IV, Section 2, relating to extradition, the Court held that the word "charge" was used ". . . in its broad signification . . ."

> "[A] party is charged with crime when an affidavit is filed, alleging the commission of the offense, and a warrant is issued for his arrest; and this is true whether a final trial may or may not be had upon such charge. It may be, and is, true, that in many of the states some further proceeding is, in the higher grade of offenses at least, necessary before the party can be put upon trial . . ." *In re Strauss,* 197 U.S. 324, at 331 (1905).

The spectrum of the possible points at which a criminal prosecution can be said to have "commenced" is virtually infinite. Quantitatively, it may begin with the commission of an offense in the presence of a police officer. It may begin with an arrest; or upon the complaint of a victim or a witness, or the report of an informant to the authorities; or upon the filing of a complaint or the issuance of a warrant. It may take inception from an administrative investigation. Qualitatively, it can be thought to begin when a "general inquiry" begins to "focus on a particular suspect;" or when probable cause exists to arrest or to indict; or when the authorities are reasonably certain they have the evidence to convict. The only factor common to all is the need to proceed with orderly dispatch to a conclusion once begun.

For the reason that neither quantitative nor qualitative criteria will suffice in all cases, therefore, the right to a speedy trial should attach when the Government knows, or ought with reasonable diligence to know, a crime has been committed by the one who is ultimately brought to trial. And, of course, only orderly expedition should be required throughout at all stages, consistent with the legitimate interest of the Government in completing its investigation, preparing its case, and exercising its executive discretion whether to proceed to trial, but consistent also with the interest of the accused in preparing his defense and in knowing his fate as promptly as possible, and consistent with the interest of society in the efficient administration of criminal justice.

The Government argues that, if pre-indictment delay is to be taken into account in determining whether Constitutional rights—either speedy trial or due process—have been violated, then either the delay must be shown to have been "purposeful or oppressive" or the accused must show "actual" prejudice in making his defense.

Pollard v. *United States,* 352 U.S. 354 (1957), in which the phrase "purposeful or oppressive" first appeared, *id.* at 361, did not hold a delay in proceedings of whatever magnitude of no consequence if occurring "accidentally" rather than "purposefully or oppressively." It held merely that delayed reimposition of sentence, necessitated by the technical invalidity of the original and timely sentencing, did not, in the circumstances of the case, violate the right to a speedy trial. Moreover, four justices dissented from the majority opinion so holding, and in subsequent cases this Court has not considered the Government's motive of significance in finding prosecutorial delay to have denied

a speedy trial, notwithstanding the absence of proof that the prosecuting authorities acted "purposefully" or "oppressively." *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967); *Smith* v. *Hooey,* 393 U.S. 374 (1969); *Dickey* v. *Florida,* 398 U.S. 30 (1970). As the Court has said in another context, "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady* v. *Maryland,* 373 U.S. 83, at 87 (1963). Proof that the Government's inaction was actuated by the equivalent of malice may not only be impossible to acquire, thus rendering the right unattainable, but the potential for prejudice is unameliorated whether the delay is vindictive, negligent, or merely inefficient.

As there is no decision of this Court requiring the victim of a trial delayed to show unlawful motive on the part of the Government, so there is no decision requiring a showing of "actual" prejudice attributable to the delay as a conditon to dismissal of stale charges against him. *United States* v. *Ewell,* 383 U.S. 116 (1966), held the right to a speedy trial not violated by reindictment for the same offense when prior indictments (to which guilty pleas had been entered about a year earlier) were voided on technical grounds, in the absence of a showing of prejudice of any description.

Actual prejudice there is, however, in all excessive delay, whether or not demonstrated upon the record. The essence of the trial process itself is a reconstruction of past events from present memory, and the phenomenon of the attenuation of human memory over an interval of months and years is so much a part of universal human experience that its formal demonstration from the witness stand would be superfluous. The entire body of the law of evidence is devoted to assuring

as much accuracy as possible from an essentially unreliable faculty. See, generally, Hutchins and Slesinger, *Some Observations on the Law of Evidence—Memory,* 41 Harv. L.Rev. 860 (1928). It is axiomatic that "[t]he more recent the experience, the better the memory of it." Gardner, *The Perception and Memory of Witnesses,* 18 Corn. L.Q. 391, at 392-393 (1933).

Unlike a prosecution for a single dramatic event such as a crime of violence, a prosecution for business fraud alleged to have persisted for a two-year period will be predicated upon evidence the defendant will not be able to predict or ascertain with any certainty. Until the Government's case is disclosed to him, he may not know which "specific evidence . . . has actually disappeared or has been lost, [or] witnesses who are known to have disappeared." *United States* v. *Ewell,* 383 U.S. 116, at 122 (1966). Moreover, when the potential prejudice inhering in delay in the disposition of criminal charges is that of his own loss of detailed recollection of telephone conversations, business conferences and negotiations, the circumstances surrounding the routine execution of contract forms, and similar unremarkable events long past, to impose upon a defendant the burden of a formal display of his fallible memory in support of his claim of prejudice is to offer him a Hobson's choice in electing to assert his speedy trial right. Since it is to his advantage to prove the prejudice and secure his freedom, the defendant's protestations of an inability to remember are likely to be given limited credence and rejected. If so, then for all practical purposes the Government's version of the disputed events will prevail, no matter the defendant's testimony which is *a priori* impeached by his prior disclaimer of memory of those events, with his very testimony from purported

memory, however, further rebutting his claim of prejudice.

Academic commentators are agreed that a showing of actual prejudice where it exists as a prerequisite to relief under the speedy trial clause should be discarded. Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, at 493 (1968); Note, *Constitutional Right to a Speedy Trial: The Element of Prejudice and the Burden of Proof,* 44 Temp. L.Q. 310, at 316 (1971); Note, *Constitutional Limits on Pre-Arrest Delay,* 51 Iowa L.Rev. 670 at 678-679 (1966). The potential for prejudice is sufficiently apparent in the circumstance of delay alone to allow it to be presumed.

In the instant case the indictment, filed April 21, 1970, charges fraudulent motive and conduct in the course of appellee's business activities over a 23-month period beginning March 15, 1965. Appellee's entire business records have been in the Government's exclusive possession for over two years now at the minimum and a possible three years at the maximum. He has not been in that business for more than four years. There is certainly a "reasonable possibility" that he will not be able to remember and to testify with clarity about the allegedly illegal transactions of which he is accused. And in the District of Columbia no more, at present, is required. *Hedgepeth* v. *United States,* 364 F.2d 684 (D.C. Cir. 1966); *Harling* v. *United States,* 401 F.2d 392 (D.C. Cir. 1968), certiorari denied, 393 U.S. 1086 (1969); *Hinton* v. *United States,* 424 F.2d 876 (D.C. Cir. 1969); *United States* v. *Holt,* (App. No. 23, 928, D.C. Cir., decided June 28, 1971).

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as without the jurisdiction of the Court. Alternatively, as a matter of the proper scope of review of a discretionary ruling of a trial court or upon a proper interpretation of the Sixth Amendment as applied to the circumstances of this case, the order of the District Court from which this appeal is taken should be affirmed.

Respectfully submitted,

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July, 1971.

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IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA, *Appellant,*

v.

WILLIAM R. MARION and SAMUEL C. CRATCH, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("Association") is composed of more than 1,000 attorneys who are actively engaged in the practice of criminal law in at least 44 States, Puerto Rico,

the Virgin Islands and the District of Columbia.[1] The day-by-day conduct of their profession involves every stage and facet of the entire process of criminal justice in both State and Federal Courts. With significant and increasing frequency, they are being confronted by problems and questions addressed to unjustified and unreasonable delays in the prosecution of criminal cases, the issue presented in this case.

This case presents the issue of unreasonable and unjustifiable prosecutorial delays in a context, not heretofore expressly decided by this Court—at a time prior to the formal initiation of criminal proceedings.[2] The individuals involved may or may not be aware that their conduct is under investigation or that they may likely or possibly be the subject of formal criminal proceedings. If they do know and consult an attorney, defense counsel must advise such clients of the legal and practical alternatives which are available. If such individuals are not aware that they are the target for ultimate prosecution, but criminal proceedings nevertheless eventuate, defense counsel who ultimately appear are confronted with the problems such as a stale record and unavailable witnesses which those circumstances generate. In either event, this case should elucidate the rules and rationale which will dominate the professional consideration and advice given such persons by defense counsel in criminal cases.

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[1] The Association is filing this Brief as *Amicus Curiae* pursuant to the written consent of all parties as provided in Rule 42(2); the letters of consent have been lodged with the Clerk of this Court.

[2] Hereinafter, "pre-indictment" will refer to such formal initiation, whatever the procedure.

The Association supports the position of Appellees that the judgment below dismissing the indictment should be affirmed.[3] Its position is that unreasonable and unjustified prosecutorial delays, prior as well as subsequent to indictment, are in such fundamental conflict with the preservation of the integrity and effectiveness of the administration of criminal law and of fundamental individual rights that they should be judicially condemned; and that the provisions and purposes of the Fifth and Sixth Amendments to the Constitution sustain and require such condemnation.

STATEMENT OF THE CASE

The only significant and relevant chronology in this case is the following:

1. The conduct with which Appellees were charged occurred between September 3, 1965 and January 19, 1966;

2. The Government was clearly aware of this conduct by late 1966;

3. The conduct received notoriety by press treatment in 1967; but

4. The indictment was not returned until April 21, 1970.

Appellees were charged with having engaged in a fraudulent second mortgage scheme, including inducing home owners to sign deeds of trust and promissory notes on the basis of false promises and representations, altering these notes after they were signed, and

[3] This Brief is addressed solely to the merits; it does not discuss the issue of jurisdiction, but assumes *arguendo* that this Court may consider the merits.

thereafter transferring them to purported holders in due course. The last of the acts charged in the indictment was alleged to have occurred on January 19, 1966.

Prior to December 8, 1966, the Government was clearly aware of Appellees' conduct, for on that date, the Federal Trade Commission issued a complaint against Appellees, alleging that the Commission had reason to believe that certain acts and practices (identical or similar to those alleged in the indictment) engaged in by Appellees were misleading and deceptive under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; this administrative proceeding resulted in a cease and desist order entered on default on February 6, 1967.[4]

In 1967 the press carried numerous articles purporting to disclose allegedly fraudulent second mortgage schemes such as are embraced by the indictment. On March 30, 1967, the United States Attorney for the District of Columbia received a lengthy official report on the activities of one firm in the second mortgage business (A. 25). In a series of articles in *The Washington Post* commencing on September 30, 1967, the activities of various companies, including that operated by Appellees were discussed (A. 24-28). On October 11, 1967, the *Post* reported that a special grand jury had been sworn in to conduct its own investigation of second mortgage schemes (A. 27); and in October 1967 the United States Attorney was quoted as having said that he expected indictments within two weeks (A. 28). In fact, the grand jury which returned the indictment

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[4] *Allied Enterprises, Inc.*, CCH Trade Reg. Rep. ¶¶ 17,787, 17,849 (1965-1967 Transfer Binder).

against Appellees was sworn in on September 2, 1969, and returned this indictment in April 1970 (*ibid.*).

The indictment charged Appellees with four counts of mail fraud, one count of wire fraud, and fourteen counts of transporting falsely made securities in interstate commerce, all in violation of 18 U.S.C. §§ 2, 1341, 1343 and 2314.

Appellees filed a Motion to Dismiss Indictment for Failure to Afford Speedy Trial. The record below consisted of the motion papers and the colloquy of counsel. According to counsel for the Government, the only explanation for the delay was "that the U. S. Attorney's office at the time was not sufficiently staffed to proceed as expeditiously as Your Honor might have liked for us to proceed" (A. 35). There was at that time a "heavy caseload" in the United States Attorney's Office in general and in particular with respect to fraud cases (*ibid.*). The Court below dismissed the indictment on the ground that "there appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions [when] they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968" (A. 39). The Court held that the matters were known to the United States Attorney's Office or were common knowledge which that office should have known in early 1967 or in late 1967 at the latest (*ibid.*). So far as prejudice was concerned, the Court held that "by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been

seriously prejudiced by the delay of at least some three years in bringing the prosecution" (*ibid.*). For these reasons holding that "there has been a lack of speedy prosecution in this case," the Court granted the Motion to Dismiss (*ibid.*).

SUMMARY OF ARGUMENT

I.

Preservation of the Integrity and Effectiveness of the Administration of Criminal Justice and Basic Individual Constitutional Rights Requires Judicial Condemnation of Unreasonable and Unjustified Prosecutorial Delays.

A. The Government delays in this case prior to indictment amounted to over four years after the last of the acts which the Government alleges was criminal, over three years and four months after those acts were known to the Government and over approximately three years after they were extensively publicized in the community daily newspapers. These multiple-year Government delays are so extensive as to be clearly unreasonable, unless they are sufficiently justified. In this case, however, the only justification proffered by the Government was its claimed "understaffing." To accept any such Government plea is to elevate Government administrative convenience above Constitutional prescription. In every case the Government can assert it elected to divert its personnel to other cases and to pass over the case at bar until it suited its purposes and expediency to prosecute it. The sole Government justification is thus utterly unacceptable. Accordingly, the delay in this case must be taken as unjustified as well as unreasonably prolonged.

B. Unreasonable and unjustified prosecutorial delays wreak a malignant impact upon the integrity and

effectiveness of the administration of criminal law and upon the ability of the individual to defend himself and to enjoy other individual rights. This is true regardless of whether the delay is before or after indictment.

Reasonable speed in the criminal process has long been a mandate in the common law. It first appears in Magna Carta, and without any intimation that pre-indictment time is distinguishable from post-indictment time. It finds consistent expression in common law decisions condemning continuing criminal action after pre-indictment delays. Where there was no justification for a pre-indictment delay of two years, for example, to permit further proceedings was characterized as "monstrous." *Regina* v. *Robins*, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844).

This same instinctive aversion to delay at any stage of the entire criminal law process is characteristic of popular and professional opinion to this day, and with excellent reason. Speed is one of the criteria for appraising the integrity and effectiveness of the entire system, speed measured from the date of the alleged offense. Not only the victim of the allegedly criminal conduct but society at large in effect waits to see how promptly and effectively the system of criminal justice can and will act to redress the wrong. If the system reacts with unreasonable and unjustified delays, the inexorable result is deterioration if not destruction of respect for and faith in the law.

Further, delays in the period before indictment impair the ability of the individual to defend himself at any subsequent trial. Particularly when the individual has no idea that he is the subject of investigation and accusation, he will make no effort to obtain the assist-

ance of counsel, memorialize the events which are in issue or otherwise make plans and efforts to maximize his ultimate defense. This is illustrative of the cases in which pre-indictment delay is even more pernicious than post-indictment delay. Even where the individual is aware that he is the subject of Government interest, the passage of time without an indictment confirms in his mind that no criminal action is forthcoming and, again, efforts are not undertaken for his own defense which would surely have been taken had the Government indictment been prompt. Obviously, with the passage of time recollection and testimony fade and evaporate, documents may be lost, and in general the prospects for a fair trial are dimmed if they do not disappear altogether.

Furthermore, the individual is prejudiced by delay in the criminal process, when he has been publicly accused albeit not by indictment, by worry and concern and also by impairment in his personal relations with the consequent curtailment of his individual rights such as the right of association. Because of these malignant consequences, unjustified and unreasonable prosecutorial delays in the period before as well as that after an indictment should be judicially proscribed.

II.

Preclusion of Unreasonable and Unjustified Preindictment Prosecutorial Delays Best Serves the Purposes and Provisions of the Fifth and Sixth Amendments.

A. In Constitutional adjudications on criminal procedure, there is a concept of fair trial which embraces rights deemed so fundamental that they are accorded individuals without regard to a showing of actual prejudice in the particular case. For the rea-

sons demonstrated in "I" above, the right to be free of unreasonable and unjustified prosecutorial delays is such a right. Accordingly, it should be judicially proscribed without requiring a showing of actual prejudice. If such a showing is to be required, however, it has been made on this record. Appellees' ability to defend themselves has been so impaired that the District Court was correct in dismissing the indictment.

The statutes of limitations are irrelevant to Constitutional considerations. The Framers intended to provide safeguards for individual rights as against all Government intervention or invasion; they intended no special exemption on the ground of statutory limitation from judicial enforcement of fundamental individual rights.

B. The purposes and provisions of the Fifth Amendment Due Process Clause are best served by preclusion of unreasonable and unjustified pre-indictment prosecutorial delays. Such delays cannot be harmonized with the concepts of fair trial and fair procedures embodied in the Clause.

C. The purposes and provisions of the Sixth Amendment Speedy Trial Clause are likewise best served by preclusion of unreasonable and unjustified pre-indictment prosecutorial delays. The Sixth Amendment consists entirely of rights deemed the most fundamental by the Framers; had they been content to leave these rights in the same status as other rights within the circumference of the concept of Due Process of Law, they would not have taken pains to add to the Constitution a Sixth Amendment which specified only certain specially selected rights.

On the face of the Sixth Amendment, each of the enumerated rights has equal status. No requirement

that a defendant make a showing of prejudice is imposed for the other Sixth Amendment rights. The right to a speedy trial, to be free of unreasonable and unjustified prosecutorial delays before as well as after indictment, stands on no lesser footing than any of the other rights; and, accordingly, no showing of actual prejudice should be exacted as a condition precedent for its enforcement.

The right to a speedy trial does indeed accrue prior to formal indictment. This was the holding as to the right to the assistance of counsel in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and that principle is applicable throughout the rights ensconced in the Sixth Amendment. Furthermore, history teaches that the concept of speedy trial embraced the pre-indictment period. At the common law of England the normal method of criminal prosecution was by private litigation and the common law decisions, as noted above, consistently condemned pre-indictment delays; and for the same reasons reflected in the dismissal of this indictment by the District Court.

ARGUMENT

I.

PRESERVATION OF THE INTEGRITY AND EFFECTIVENESS OF THE ADMINISTRATION OF CRIMINAL JUSTICE AND BASIC INDIVIDUAL CONSTITUTIONAL RIGHTS REQUIRES JUDICIAL CONDEMNATION OF UNREASONABLE AND UNJUSTIFIED PROSECUTORIAL DELAYS.

A. This Case Involves Unreasonable and Unjustified Prosecutorial Delays.

As the foregoing Statement reveals, this case involves delays on the part of the prosecution so extensive as clearly to be unreasonable in the absence of justification—(1) over four years between the last allegedly criminal act and the return of the indictment;

(2) over three years and four months between clear Government awareness of Appellees' conduct and the institution of an administrative proceeding against them and the indictment; and (3) approximately three years between the time that press articles made the alleged offenses a matter of common knowledge in the community and the indictment.

The only justification proffered by the Government for its protracted delays was that it had decided not to assign this case timely to the staff it had, a decision which the Government termed "understaffing." For its own administrative purposes the Government turned its staff away from this case for the extended periods of time shown on this record.

To accept any such Government plea is to subvert the fundamental values represented by the Speedy Trial Constitutional mandate. For the Government would always have this plea at hand; whenever challenged it could plead that the delay was caused by its having diverted its personnel to other matters. But the very concept of speedy trial is to preclude such absolute Government control over the scheduling of the reach of Government criminal law into private lives. To permit the Government to time its charges and trials to suit its own expediencies and purposes favors tyranny rather than democracy.

The very purpose of the fundamental rights ensconced in the Bill of Rights, including those related to fair and speedy trial, is to immunize individual rights from Government abuse and invasion. Certainly the Government cannot escape from the Constitutionally specified restrictions on Government which are the hallmarks of American Democracy simply by pleading

its own administrative choice and convenience in a particular case. Beyond doubt, therefore, the delays in this case must be considered unjustified as well as unreasonably prolonged.

Such delays, we demonstrate in Point I, should be proscribed by the Court because of their malignant impact upon (1) the administration of criminal justice, (2) the ability of the individual to defend himself at any trial, and (3) other basic individual Constitutional rights. In Point II, we will demonstrate that these evils are to be condemned under the purposes and provisions of both the Due Process Clause of the Fifth Amendment and the Speedy Trial Clause of the Sixth Amendment and the concept of fair trial which they embody. In our view, when a Court finds that the Government has in fact engaged in unreasonable and unjustified prosecutorial delays, the indictment must be dismissed (or the conviction reversed). The defendant should not be required to show actual prejudice any more than he does to be accorded any other fundamental Constitutional right, but if some showing of prejudice is to be imposed, the requirement is amply satisfied upon the facts of this record.

B. Unreasonable and Unjustified Prosecutorial Delays Have a Malignant Impact upon the Integrity and Effectiveness of the Administration of Criminal Justice and Basic Individual Constitutional Rights.

1. The administration of criminal justice.

Delay of itself is antagonistic to the Constitutional rights of the individual who is the object of the Governmental action. "Stale claims have never been favored by the law, and far less so in criminal cases." *Dickey* v. *Florida,* 398 U.S. 30, 37 (1970). "Justice delayed is justice denied" has long been and remains

a maxim which is at once a beacon to the law in theory and an indictment of the law in practice.[5] This instinctively felt abhorrence of delay in the administration of justice is directed at delay at any stage of the entire process, from the event or events which give rise to the subsequent legal proceeding to the ultimate conclusion of that proceeding. It does not welcome or excuse delay at any stage of the process, whether before or after indictment or at any other particular signpost along the entire way.

a. *Common Law Decisions Condemning Pre-Indictment Delay.*

Almost eight centuries ago this aversion to delay found expression as an individual right to receive prompt treatment at the hands of the law. "That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right' * * *." *Klopfer* v. *North Carolina,* 386 U.S. 213, 223 (1967). In neither the text of the Magna Carta nor Coke's commentaries thereon is any distinction drawn because of the stage of the process in which delay or denial of right of justice occurs. *Id.* at 224. The significance of this great prescription of

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[5] The Latin equivalent of this maxim evidently derives from Coke, *The Second Part of the Institutes of the Laws of England,* 55 (Brooke, 5th ed., 1797). *Klopfer* v. *North Carolina,* 386 U.S. 213, 224, n. 14 (1967). The English version is commonly credited to Gladstone. Eckler, *Historical Review: Lagging Justice,* Annals of the American Academy of Political and Social Sciences, Vol. 328, p. 6 (Philadelphia 1960).

right was that justice must have three qualities, that it be free, full and swift. *Id.* at n. 14.

This guarantee of individual rights was reflected in the common law in the special arena of the criminal law pitted against the individual citizen, and with respect particularly to unreasonable and unjustified delays prior to the commencement of criminal proceedings. One of the very earliest statements was the declaration by Lord Mansfield in *Rex* v. *Robinson,* 1 Black. W. 541, 96 Eng. Rep. 313, a decision rendered in 1765 and thus antedating the Declaration of Independence. Lord Mansfield there refused a motion for a criminal information against the defendant, *inter alia,* on the ground that over two years had expired since the offense and "the delay is not accounted for." *Id.* at 542, 314. In *Rex* v. *Marshal and Grantham,* 13 East 322, 104 Eng. Rep. 394 (1811), furthermore, the Court refused to entertain an application to proceed with criminal prosecution prior to indictment "because it was made so late in the second term that the magistrates would have no opportunity of shewing cause in the present term against a rule nisi for an information, if granted." *Ibid.* Identically, *Regina* v. *Hext,* 4 Jurist 339 (1840), held that a rule for a criminal information would not be granted where a whole term had been allowed to intervene between the alleged offense and the application to the jurisdiction of the Court. The applicant there sought to justify the lapse of time between the alleged offense and the application by his efforts to settle the case. But the holding was that the application was required "to have been more prompt."

The classic common law statement is that of Baron Alderson in *Regina* v. *Robins,* 1 Cox's C.C. 114 (Somer-

set Winter Assizes, 1844), which "is an example of an English court applying a standard of fundamental fairness when charges were not preferred for more than two years." *Nickens* v. *United States*, 323 F. 2d 808, 810, n. 2 (D.C. Cir. 1963), *cert. denied*, 379 U.S. 905 (1964). There was no satisfactory explanation of the cause of the delay. Baron Alderson directed the jury to acquit defendant, holding, "I ought not to allow this case to go further. *It is monstrous to put a man on his trial after such a lapse of time.*"[6] The entire idea violated the Court's instinctive sense of justice.

Although that decision was rendered after the United States of America became a separate nation, it conformed to the common law as it had existed for centuries and thus at the time of Independence. *Robins* and the other decisions of identical purport are the best statements of the decisional and intuitive stand of the common law against unreasonable and unjustified prosecutorial delays at any stage of the entire administration of criminal law.

b. *Reasons for Aversion To Delay Even More Forceful Today.*

The fundamental reasons for this instinctive antagonism to delay are inherent in human nature and remain dominant today. It appears self-evident, for example, that the closer in time which the criminal law activates itself in relation to the alleged offense, the greater the popular and professional faith and trust in the entire

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[6] Emphasis is added here and throughout this Brief and footnotes in quotations are omitted, unless otherwise specified.

process of criminal administration.[7] What "is indispensable to command the respect and confidence of the community in applications of the criminal law" is a compelling factor in Constitutional adjudication. *In Re Winship,* 397 U.S. 358, 364 (1970).

Most dramatically from the viewpoint of the victim of the alleged criminal conduct, there is need for prompt as well as effective criminal action if that faith and respect is to be sustained. From the viewpoint of the public at large, when there has been some public accusation in the press or other media, as there was in this case, and particularly when that publicity includes the statements by the prosecutorial arms or even other branches of the Government, as there were in this case, any prolonged lapse of time without any criminal proceedings being undertaken signifies a breakdown or indifference of the entire Governmental machinery for criminal justice. To the public view, extended delay prior to indictment denotes a greater default of the desired "law and order" than a delay after indictment, for with indictment the public can at least see that the prosecutor has done something.

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[7] The Attorney General has frequently called attention to "slow justice" and the pressing fact "that the American public is concerned about its system of justice—while confidence in that system is indispensable to an ordered society"—most recently before the American Bar Association at London. Department of Justice, Press Release, July 16, 1971, "In Quest of Speedy Justice", Address of the Attorney General of the United States, pp. 7, 3. On January 5, 1971, the Second Circuit promulgated Rules Regarding Prompt Disposition of Criminal Cases. The accompanying Statement to the Circuit Council declared (p. 7), "The general observance of law rests largely upon a respect for the process of law enforcement. When the process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded."

The preachment and promise of the criminal law is that the commission of a crime will generate swift, successful and fair Governmental action at every stage of the process, investigation, arrest, arraignment, trial, sentence, and correction and rehabilitation. Unreasonable and unjustified delay is disillusioning, is violative of society's preachment and promise, identically whether it occurs prior or subsequent to indictment. Any such delay pollutes the administration of criminal justice, without regard to the causes, if any, which the citizen speculates or assumes for it. The popular response which would be most favorable to the criminal law is that the prosecutorial officials are acting in complete good faith—that they are, for example, diligent and efficient but overwhelmed by the case load. More destructive of the effectiveness of criminal law would be the assumption that the prosecutorial officials are not evil or corrupt but are only indifferent or negligent. Given the temper of the times, however, the popular assumption may well be that the delay is not inadvertent, but by prosecutorial design, immediately generating the further assumption that there is some impropriety, some unsavory "deal", which is the covert but true cause. Whatever the cause assigned by the public in general, delay breeds distrust, resentment and frustration, and thus infects and destroys the integrity and effectiveness of the entire criminal law process.

Moreover, it is popular knowledge and virtually a truism that delay of itself, whenever it occurs, adversely affects the trial and indeed may make trial impossible or difficult for one side or the other. Most obviously, witnesses may become unavailable with the passage of time. Witnesses may die, move beyond the jurisdiction, be ill or otherwise unreachable by sub-

poena or persuasion. For those witnesses who are available, as well as the parties and potential witnesses, the sheer onward march of time erodes the breadth and accuracy of memory. It may indeed move evidentiary recollection of the events in issue beyond the pale of confident and accurate memory. Nor are actual and potential witnesses the only source of evidence which may erode by the simple passage of time whenever that occurs. With delay there is an enhanced possibility of loss or damage to documentary and other evidence.

While these deleterious results of delay have been true for centuries since they inhere in the nature of man, they are magnified and intensified by the increasing complexity and variety of modern life. The sheer numbers of occurrences and distractions of attention and accurate observation are being multiplied by such factors as the onset of technological advance and the population explosion. They create new and fortify old barriers to accurate observation, memory and recounting. They enhance the inevitable prejudice against fair and realistic trial engendered by delay. All these factors of course work just as profoundly and pervasively if the delay is prior rather than subsequent to indictment.

2. The ability of the individual to defend himself at any trial.

The general evils that inhere in delay are displayed most poignantly in the impairment of the individual's right to defend himself at any trial. As this Court has held, one of the very "basic demands of criminal justice in the Anglo-American legal system" is " 'to limit the possibilities that long delay will impair the ability of an accused to defend himself.' " *Smith* v. *Hooey,* 393 U.S. 374, 378 (1969), reiterating *United States* v.

Ewell, 383 U.S. 116, 120 (1966). Manifestly, delay inflicts this injury because " 'evidence and witnesses disappear, memories fade, and events lose their perspective' * * *." *Smith* v. *Hooey, supra,* at 380, citing Note, *Effective Guarantee of a Speedy Trial for Convicts in Other Jurisdictions,* 77 Yale L.J. 767, 769 (1968). These "erosive effects of the passage of time", *Smith* v. *Hooey, loc. cit. supra,* are the product of delay *per se.* Manifestly, they are identical whether that delay is before or after the formal commencement of criminal proceedings.[8]

A delay of 22 months without satisfactory explanation in the pre-indictment period was held to prejudice and even preclude any effective defense, in *Regina* v.

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[8] The Government concedes that the ultimate ability to present the defense at trial "may of course be affected by the passage of time before, as well as after indictment or arrest." Gov. Br. 19. While this evil impact of pre-indictment delay of course does not depend on when the Government has sufficient evidence to move against a suspect, *ibid.*, the significance of that time is that thereafter all delay is fairly to be chargeable to the Government. From that time the question runs as to whether the delay was unreasonable in its duration and if so whether the prolonged delay was unjustified.

In emphasizing that its assignment of greater resources to the particular case would in practice result in an earlier indictment and arrest, *id.* at 19-20, and in suggesting that the recognition that the Sixth Amendment embraces preindictment delays might "encourage expediency on the part of prosecutors and discourage thoroughness," *id.* at 21, the Government unwittingly emphasizes the realistic imperative of considering the entire criminal law process in a particular case as one integrated continuum not truly capable of subdivision into independent pre- and post-indictment legal categories. The Government obviously views its speed of performance as integrated and interrelated throughout the entire process. At all stages, whether before or after indictment, the Government is transparently in control of the timing of the process for its own purposes.

Robins, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844): "How can he [the defendant] account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

In many circumstances, delay prior to indictment infringes the individual's ability to defend himself even more than delay after indictment.[9] This is most obvious in the case of the individual who has no knowledge that he is the object of prosecutorial attention. He has no reason to consult an attorney or make any effort to sharpen his recollection, obtain witnesses,

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[9] "Surely it is evident that the prejudice to his defense which a defendant suffers due to post-arrest delay is indistinguishable from that which pre-arrest delay may occasion. * * * Witnesses become inaccessible and memories are dulled regardless of how the delay is labeled. *Indeed, the uncharged defendant who suffers pre-arrest delay may be at an even greater disadvantage than the charged defendant who endures post-arrest delay.* The charged defendant is at least on notice that a criminal prosecution has been instituted against him and he can marshal evidence and build a defense with the assistance of counsel during the delay period. In contrast, the uncharged defendant is typically unaware that the police are ready to arrest and prosecute him at some future time. He is thus foreclosed from taking any action to forestall the eroding effect that substantial delay between the alleged offense and arrest will most likely have on his ability to prepare and prove a defense." Note, *Pre-Arrest Delay: Evolving Due Process Standards,* 43 N.Y.U. L.Rev. 722, 725 (1968). See also Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 489 (1968); Note, *Justice Overdue: Speedy Trial for the Potential Defendant,* 5 Stan. L.Rev. 95, 100 (1952).

maintain records, or otherwise safeguard testimony or take actions favorable to his defense. Even if he should know that he is the object of prosecutorial attention, he may lack the resources to employ counsel both before and after indictment; or may otherwise decide or not be in a position to obtain the advice of counsel or otherwise to take the measures on his own behalf which he would take upon the knowledge that he was indeed involved in a criminal trial. The human tendency to hope for the best, to believe that it cannot happen to me, to avoid the unpleasant and difficult until some cold actuality rather than possibility imposes its pressures from the outside, all militate against the individual's taking the same actions to prepare a real defense prior to indictment as he would perforce take upon indictment.

Delay in indictment also prejudices the defendant and benefits the Government by postponing whatever right of discovery the defendant may have. The Government would hardly concede that any obligations it would acknowledge under such decisions as *Brady* v. *Maryland,* 373 U.S. 83 (1963), or Rule 16, Federal Rules of Criminal Procedure, commence prior to indictment. Obviously, whatever facts are forthcoming by virtue of discovery will likely lead to other avenues of factual exploration; but delay may close or cool those avenues to the defendant. These factors work against the individual during the pre-indictment period but are manifestly not operative after the indictment. Accordingly, the severe prejudice to the ability of the individual to defend himself in any subsequent criminal trial produced by unreasonable and unjustified Government pre-indictment delay is an eloquent advocate for dismissal of the indictment.

3. Invasion of other individual rights.

The prejudice to the individual's ability to defend himself should a trial eventuate is not the only impairment of individual rights wreaked by delay, whether before or after indictment. It is also one of the "basic demands of criminal justice in the Anglo-American legal system: * * * to minimize anxiety and concern accompanying public accusation * * *.'" *Smith* v. *Hooey*, 393 U.S. 374, 378 (1969), citing *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). While the "public accusation" in *Smith* and *Ewell* took the form of a formal indictment, the impact is no less real when the accusing voice is that of a Government agency and also that of newspaper articles, and particularly press statements quoting the public prosecutor. Those surely are public accusations in the eyes of the world and they must therefore be the same in the eyes of the law.[10]

Human experience—the life of the law—declares in no uncertain terms that the individual who has been made the target of this public and Governmental albeit not formally prosecutorial accusation suffers within himself. His physical and mental state and health will necessarily be affected. In addition to his subjective worries and concerns, such public accusations will inevitably bring some burden or even break in the

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[10] Reality thus refutes the Government's easy assertion that this safeguard of the Sixth Amendment is "usually not pertinent when the delay occurs before indictment or arrest. The defendant * * * has not yet been charged with a crime." Gov. Br. 18. The Government does admit awareness of the newspaper articles but asserts they attributed no allegation of wrongdoing to the United States Attorney and "no official statements of any kind had charged them with criminal activities." *Id.* at 19, n. 11. That is unrealistic; see Statement of the Case, *supra*, at 4.

accused's relationship to others—to family, occupation, reputation and community standing. In the human reality reflected in the law, a charge of wrongdoing made in the press is "an outstanding untried charge" which must inevitably have a "depressive * * * effect * * *." *Smith* v. *Hooey,* 393 U.S. 374, 379 (1969). The pendency of this public charge against the accused in the absence of an indictment, no less than the pendency of an indictment, "may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participations in unpopular causes." *Klopfer* v. *North Carolina,* 386 U.S. 213, 222 (1967). There should be no "prolonging [of] this oppression * * *." *Ibid.*

II.

PRECLUSION OF UNREASONABLE AND UNJUSTIFIED PRE-INDICTMENT PROSECUTORIAL DELAYS BEST SERVES THE PURPOSES AND PROVISIONS OF THE FIFTH AND SIXTH AMENDMENTS.

A. The Concept of Fair Trial Reflected in Both the Due Process and Speedy Trial Clauses Requires Dismissal of Indictments Brought by the Government After Unreasonable and Unjustified Delays.

1. Such dismissal should be required as a matter of absolute Constitutional right, without imposing upon the individual any burden of showing actual prejudice.

Beyond doubt, there is a fundamental concept of "fair trial" which embodies certain minimum procedural safeguards guaranteed every individual subject to the criminal process as a matter of absolute right. When this concept is at the forefront of decision, the issue is whether the particular standard has been violated. To reverse a conviction or dismiss an indictment, the defendant need not undertake any showing

of prejudice; the only showing required is deprivation of some procedural right essential to a fair trial. While the particular legal rubric varies, the constant principle is that the particular requirement of law is recognized as requiring enforcement for its own sake. Its contribution to the concept of "fair trial" is deemed so important that actual prejudice in the individual case is either irrelevant or presumed.

This Court did not require any showing of prejudice, for example, in reversing a conviction when women had been systematically excluded from the jury. "To insulate the courtroom from either [sex] *may not in a given case make an iota of difference.* Yet a flavor, a distinct quality is lost if either sex is excluded. * * * The point illustrates that the exclusion of women from jury panels *may at times be highly prejudicial* to the defendants. *But reversible error does not depend on a showing of prejudice in an individual case.*" *Ballard* v. *United States,* 329 U.S. 187, 194-195 (1946). Similarly, in *Glasser* v. *United States,* 315 U.S. 60, 75-76 (1942), this Court held, "To determine the precise degree of prejudice sustained by Glasser * * * is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[11] And there are many other cases to like effect including those, discussed *infra,* enforcing rights expressly specified in the Sixth Amendment.

The touchstone is not actual prejudice shown in the particular case by the defendant, but probable preju-

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[11] *Glasser* is a case of Constitutional dimension. *Witherspoon* v. *Illinois,* 391 U.S. 510, 518 (1968).

dice established for the generality of cases by the very nature of the Government conduct involved. This Court defined the standard as follows in *Sheppard* v. *Maxwell,* 384 U.S. 333, 352 (1966):

> "Only last Term in *Estes* v. *Texas,* 381 U.S. 532 (1965), we set aside a conviction despite the absence of any showing of prejudice. We said there:
>
> 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lack- in due process.' At 542-543."

For " 'our system of law has always endeavored to prevent even the *probability* of unfairness. * * * [T]o perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt* v. *United States,* 348 U.S. 11, 14 [citing *In re Murchison,* 349 U.S. 133, 136]." ' " *Estes* v. *Texas,* 381 U.S. 532, 543 (1965; emphasis in original).

The appearance, the probability and indeed the inevitable actuality of injustice because of unreasonable and unjustified prosecutorial delays are clear by virtue of the previous discussions in this Brief. No doubt because of such injustice the right to a speedy trial has been prized by this Court as "one of the most basic rights preserved by our Constitution." *Klopfer* v. *North Carolina,* 386 U.S. 213, 226 (1967). That status as a basic right should, in the light of the foregoing, inhibit or preclude any requirement that an accused must demonstrate actual prejudice in order to avail himself of this Constitutional right.

Moreover, to impose upon the defendant the requirement of proving actual prejudice is invariably tantamount to predetermining that there is no right to speedy trial unless a known witness has died or a known document has disappeared. But this puts an unfair if not impossible burden upon the accused. After all, for example, "it is almost impossible for a defendant to prove actual prejudice if he cannot remember his activities on the date of the offense."[12] Accordingly, no requirement of prejudice should be imposed, but in faithful adherence to the concept of fair trial, the Court should act in favor of the defendant upon finding that there was in fact an unreasonable and unjustified prosecutorial delay.

2. Assuming that some showing of actual prejudice is required, however, under the circumstances of this case appellees' showing of likely actual prejudice amply supports dismissal of the indictment.

In this case, assuming *arguendo* some showing of prejudice should be exacted from the defendant, there are a multitude of separate transactions and occurrences, and Appellees can scarcely now be expected to

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[12] Note, *The Potential Defendant's Right to a Speedy Trial*, 48 N.Car. L.Rev. 121, 127 (1969). "In a very real sense, the extent to which [the defendant] was prejudiced by the Government's delay is evidenced by the difficulty he encountered in establishing with particularity the elements of that prejudice." *Ross* v. *United States*, 349 F.2d 210, 215 (D.C.Cir. 1965). "The next stopping point, and perhaps the most reasonable one, is the time at which the police have enough evidence to give reasonable assurance of conviction. Delay in bringing charges after this point, unless the other justifying circumstances are present, can reasonably be deemed to be in bad faith—calculated to avoid the constitutional duty to give the defendant a speedy trial." Note, *Effective Guarantee of a Speedy Trial for Convicts in Other* Jurisdictions, 77 Yale L.J. 767, 785 (1968).

remember the conversations and other circumstances surrounding each of them. The fact that documents are involved and that the Government now advises its own case will be based upon documents only serves to emphasize the conclusion that detailed recollection about the circumstances, context and relationship of the documents is essential to the defense; and thus serves to compound the prejudice to the defense because of the failure of such recollections through the passage of time imposed by the Government. Beyond this, as the Government concedes, there is an allegation of wire fraud which the Government acknowledges would have to be proved "through the mouth of the person who supposedly received this telephone call" (A. 34). As to it the evidence patently is not documentary but is subject to the same progressive infirmities in recollection and testimony accruing from delay as is characteristic of any non-documentary criminal case. The Government attempts to derogate the prejudice by citing various related civil cases, which hardly have the same legal or factual boundaries as the criminal prosecution in any event, without recalling that almost all of them have been settled without trial.[13] Appellees were under no necessity to engage in particularized reconstruction or conservation of the past occurrences or evidence or in any element-by-element, day-by-day, trial preparation and presentation of a defense. They certainly were under no such necessity as to any criminal case because the unreasonable and unjustified Government delay signified that there would be no indictment and *a fortiori* no trial. The Government thus prejudiced the defense. That prejudice supports dismissal of the indictment on Due Process grounds.

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[13] Gov. Br. 7-8, n. 2.

3. The statutes of limitations are irrelevant to Constitutional considerations.

Despite the factor of prejudice, an argument might be fashioned, as it has been by the Government, Gov. Br. II, 22-28, that there is no role for judicial decision under Due Process or other Constitutional considerations in pre-indictment delay cases, so long as the indictment is brought within the applicable statute of limitations. But the predicate of this position, that the parameters of the statute of limitations and of the Due Process Clause are identical in this context, finds no support in history or law.

As a historical matter, Congress adopted the Bill of Rights for submission to the States in 1789—*before* it had enacted any statutes of limitations. Congress could not possibly have been according non-existent statutes with any capacity to affect, let alone to attain equal status with, the Bill of Rights. The first such statute was enacted the *following* year. Gov. Br. 24. It was a general provision of a *two-year* limitations period. *Ibid.* If history permits any inference, it is that the Framers would have approved of the judgment below.

Even in the Government view of the law there is some necessary and proper role for judicial scrutiny within the limitations period, for example, when the delay has exceptionally prejudiced the defendant or the purpose of the prosecution's delay is to impair the ability to defend. Gov. Br. 26-27. Moreover, to contend that only the legislature may regulate or adjudicate pre-indictment delays is to acknowledge that the legislature could enact limitations periods of double or triple their present lengths, without any Constitutional inhibition. The Framers who were safeguard-

ing rights to the accused in the Fifth and Sixth Amendments hardly intended to leave those rights to the legislative power without any reference to the Constitutional prescription enforceable in the Courts.[14] In short, analysis reveals that "statutes of limitations merely represent the maximum period beyond which a prosecution cannot be brought, and do not preclude judicial inquiry into the constitutionality of delays within that period." [15]

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[14] "It is difficult to explain how the existence of a statute of limitation could possibly foreclose a constitutional right. To the contrary, the sixth amendment is necessary to preserve the minimum rights of a speedy trial since a statute of limitation can be extended or contracted by a legislature. A statute of limitation sets an arbitrary limit for prosecution that does not attempt to discriminate between necessary and unnecessary delay, whereas the right to a speedy trial is founded precisely on such distinctions. To the extent that a statute of limitation bars prosecution on aged and untrustworthy evidence it overlaps with the right to speedy trial, but the decision of the legislature to set an outer bound on delay of all kinds can hardly supplant a bound on particular types of delay which may be stricter but which proceeds from a higher source." Note, *The Lagging Right to a Speedy Trial,* 51 U.Va. L.Rev. 1587, 1614 (1965).

[15] Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 492 (1968). The position that the Courts should dismiss indictments culminating from unreasonable and unjustified pre-indictment delay is necessarily predicated upon knowledge by the Government of the facts upon which the indictment could be brought, knowledge which is amply displayed on the instant record. Should the Government in fact not have knowledge, the considerations we have been espousing do not attach. Even in such a case, if the Government comes to the knowledge too late to file an indictment within the statute of limitations, criminal prosecution is forever barred. Thus the statute of limitations imposes a terminal restriction upon the prosecution even when the delay has been justified and reasonable. *A fortiori,* the statute of limitations does not preclude the judicial imposition of some shorter time period based upon Due Process considerations. *Cf.* e.g., *Petition of Provoo,* 17 F.R.D. 183 (D.Md. 1955), *aff'd sub nom. United States* v. *Provoo,* 350 U.S. 857 (1955).

B. The Purposes and Provisions of the Fifth Amendment Due Process Clause Are Best Served by Preclusion of Unreasonable and Unjustified Pre-Indictment Prosecutorial Delays.

If the Court should find it necessary or desirable to categorize this case and considers it as Due Process rather than as Speedy Trial or as fair trial combining if not transcending both the Due Process and Speedy Trial categories, the foregoing discussion demonstrates that toleration of prosecutorial action which has been unreasonably and unjustifiably delayed does indeed offend the purposes and provisions of the Fifth Amendment requirement of Due Process of Law. See, e.g., *Ross* v. *United States,* 349 F. 2d 210 (D.C. Cir. 1965). In sum, Due Process is a general guarantee of fair trial and such delays are utterly inconsistent with fair trial.

C. The Purposes and Provisions of the Sixth Amendment Speedy Trial Clause Are Best Served by Preclusion of Unreasonable and Unjustified Pre-Indictment Prosecutorial Delays.

1. The context and structure of the Sixth Amendment demonstrate the special status of each of the rights specified therein.

a. *That Certain Elements of Fair Trial and Due Process Were Specified in the Sixth Amendment Signifies Their Special Status.*

Inasmuch as the Fifth Amendment Due Process Clause may be interpreted as embracing all of the fundamental elements of fair trial, as suggested above, the reiteration of certain elements in the Sixth Amendment (or elsewhere in the Constitution) was plainly for the purpose of emphasis. The great purpose of the Sixth Amendment certainly was not to

diminish the ambit of the concept of fair trial or the Fifth Amendment Due Process Clause but to compound the certainty, a necessity in human though not logical terms, that each of the rights specified in the Sixth Amendment would be enforced scrupulously. "The fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that [it] was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas,* 380 U.S. 400, 404 (1965).

b. *The Text of the Sixth Amendment Demonstrates the Equal Standing of Each of the Enumerated Rights in Relation to the Others.*

The plain text of the Sixth Amendment accords identical stature to each of the rights enumerated therein. Indeed, the Sixth Amendment is but a single sentence, a listing of separate rights each of which is guaranteed to the accused in all criminal prosecutions. As the text is one of guaranty, there is not the slightest justification in relation to any of the specified rights for requiring the accused to make any showing of prejudice to receive what the Constitutional language grants to each and all persons.

A fortiori, on the face of the Amendment there is not the slightest justification for requiring any showing of prejudice to obtain the full benefit of the Speedy Trial Clause if in practice no such showing is required with respect to any of the other clauses. And, indeed, no such showing is required. See, e.g., *In Re Oliver,* 333 U.S. 257, 266-273 (1948) (right to a public trial; this right is a "guarantee to an accused" and its foundation is the public interest involved rather than

the benefit or prejudice to the defendant, *id.* at 270); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968), *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) (right to an impartial jury); *Pointer* v. *Texas,* 380 U.S. 400 (1965) (confrontation); *Washington* v. *Texas,* 388 U.S. 14 (1967) (compulsory process); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), *Johnson* v. *Zerbst,* 304 U.S. 458 (1938) (right to counsel); Note, *The Right to a Speedy Trial,* 20 Stan. L.Rev. 476, 494-495, n. 131 (1968).

To focus on one case for purposes of illustration, the decision in *Washington* v. *Texas, supra,* considered two questions, the applicability of the right of confrontation and whether it had been violated. Upon consideration of decisions holding that the other elements of fair trial specified in the Sixth Amendment were applicable to the States, the Court held, "The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." *Id.* at 18. The other question in the case was framed by the Court as follows: "Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case." *Id.* at 19. With the finding that it was violated, the conviction was reversed. There was no intimation of any requirement of showing of actual prejudice by the defendant.

Pari passu, the unreasonable and unjustified prosecutorial delay found by the Court here requires affirmance of the dismissal of the indictment. Certainly the right to a speedy trial "stands on no lesser footing than the other Sixth Amendment rights"; indeed, as we have seen, this Court has expressly held that "the

right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer* v. *North Carolina,* 386 U.S. 213, 223 (1967). "The speedy-trial safeguard is premised upon the reality that fundamental unfairness is likely in overlong prosecutions. * * * When the Sixth Amendment right to speedy trial is at stake, it may be equally realistic and necessary to assume prejudice once the accused shows that he was denied a rapid prosecution." *Dickey* v. *Florida,* 398 U.S. 30, 54-55 (1970) (concurring opinion).

2. The Sixth Amendment rights apply when the Government has focused on the accused; and surely for speedy trial purposes when the Government has reasonable knowledge of the facts it asserts as criminal violation.

The short answer to any contention that the language of the Speedy Trial Clause must or should be interpreted as embracing only the post-indictment period and excluding the pre-indictment period, Gov. Br. 15-16, is that this Court has squarely held that the right "to have the Assistance of Counsel for his defense," which stands on no different footing from any of the other rights enumerated in the Sixth Amendment including that to a Speedy Trial, is indeed enforceable prior to indictment. *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), ruled that the Sixth Amendment right of counsel was applicable to the interrogation there conducted by the police—even though the Court expressly recognized that the interrogation "was conducted before petitioner was formally indicted. But in the context of this case, that fact should make no difference." *Id.* at 485. The touchstone defined by the Court as to when the protections of the Sixth Amendment attach to one as an "accused" was whether "the investigation is no longer a general inquiry into an unsolved crime

but has begun to focus on a particular suspect * * * ." *Id.* at 490. The Court's holding was "only that when the process shifts from investigatory to accusatory—when its focus is on the accused * * *" the Sixth Amendment rights and protections are available; and any subsequent prosecutorial action flowing from the deprivation of any of those rights would be reversed. *Id.* at 492.[16] It is probative that the Government assays no genuine response to this direct holding in Escobedo.[17]

Moreover, this Court approved the inclusion of the time before as well as after indictment in its affirmance, 350 U.S. 857 (1955), in *Petition of Provoo*, 17 F.R.D. 183, 202-203 (D. Md. 1955). This Court affirmed the District Court's holding "that Provoo cannot have a fair trial at this late date, that he has been denied the right of speedy trial within the meaning of the Sixth Amendment, and that there have been *unnecessary delays in indicting him* and bringing him to trial." *Id.* at 203.

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[16] *Cf. United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969); *United States* v. *Casias*, 306 F. Supp. 166 (D.Colo. 1969); *United States* v. *Wainwright*, 284 F. Supp. 129 (D.Colo. 1968); *United States* v. *Turzynski*, 268 F. Supp. 847 (N.D.Ill. 1967); *but see United States* v. *Jaskiewicz*, 433 F.2d 415 (3rd Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); and cases cited therein.

[17] The only reference to *Escobedo* in the entire discussion of the Sixth Amendment, Gov. Br. "II" 15-22, or in the entire Brief for that matter, is in the context of flaying the straw man issue that Appellees' position here is the same as that taken by another party citing *Escobedo* (*id.* at 20). The holding in that other case, as cited by the Government, has nothing to do with our position in this case. We are not asserting that the Government violates the Constitution if it acts "too soon", which is all that was rejected in *Hoffa* v. *United States*, 385 U.S. 293, 309-310 (1966)—"There is no constitutional right to be arrested"—although we do urge that the Government is under the Sixth Amendment mandate not to "wait too long." That is certainly the law.

3. The historical context of the Speedy Trial Clause affirms its applicability in the pre-indictment period.

Assuming that the issue were one of first impression, it would appear to hinge on the general meaning which the Framers of the Sixth Amendment meant to put on the words "criminal prosecution" and "accused".[18] The critical historical fact is that at that time criminal prosecution at the common law was in general commenced in a completely different way from that with which we are familiar today. "By the common law of England which was brought to America by the colonists, the ordinary criminal prosecution was conducted by a private prosecutor, in the name of the King. In case the victim of the crime, or someone interested, came forward to prosecute, he retained his own counsel and had charge of the case as in an everyday civil proceeding * * *." Dession, *Criminal Law, Administration and Public Order* 356 (1948).[19] Procedurally, the "criminal prosecution" was thus commenced by the filing of a lawsuit, and thereafter the filing of an application for criminal prosecution or rule nisi or similar procedure calling for the defendant to

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[18] Resort to bare language or specific legislative history provides virtually no guidance. "Indeed, if interpreted literally, the guarantee of a speedy trial refers only to delays during the period of time in which the government and the defendant are presenting their cases to the jury." Note, *The Right to a Speedy Trial*, 20 Stan. L.Rev. 476, 491 (1968). But no one contends the word "Speedy" in the Sixth Amendment refers to the duration of the trial rather than the time consumed prior to trial.

[19] "It is significant that private prosecution is still one of the principal bases for criminal administration in Great Britain." Schwartz, *Case and Materials on Professional Responsibility and the Administration of Criminal Justice* 4 (The National Council on Legal Clinics, American Bar Center, 1961); 1 Stephen, *A History of the Criminal Law of England* 493-501 (1883).

show cause why he should not be imprisoned. In general historical fact, therefore, the English common law with which the Framers were familiar conceived of a "criminal prosecution" as being commenced prior to indictment, and thus that the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment.[20] The com-

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[20] It betrays the bedrock aspirations of the Framers to establish a better society for the future to contend, as the Government does, Gov. Br. 16-17, that in providing for Speedy Trial the Framers wore such blinders they could see only the English Habeas Corpus Act of 1679 and a Latin maxim, *nullum tempus occurrit regi*. It rewrites history to represent that those who adopted the Sixth Amendment had no intention of providing any new, more enlightened personal rights than those already provided by the English or any other legal system.

There is no basis for the Government's equation of the reach of the Sixth Amendment with that of The English Habeas Corpus Act of 1679. Gov. Br. 16-17. The Act embraced no general concept of "Speedy Trial" applicable to all crimes, but for felonies specified a particular time in terms of terms of the Court; the Sixth Amendment, contrastingly, applies to all crimes and establishes no special time but the general mandate of Speedy Trial. Even if the Act be construed as requiring "speedy trial", moreover, it does not require public trial; this clause in the Amendment demands both Speedy and Public Trial.

The Government cites the maxim "*nullum tempus occurrit regi*", Gov. Br. 17, as though such assertions of unlimited rights in the King were considered models to be followed rather than reflections of the tyranny from which the Framers intended to insulate the new nation they had formed. It is pertinent that in fact the full maxim is "*nullum tempus* aut locus *occurrit regi*," Jowitt, *The Dictionary of English Law* 1252 (1959); and the antagonism of the Framers of the Sixth Amendment to the concept that the King could proceed in any place is evidenced by that Amendment's guarantee of "the right to speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law," patently demonstrating the rejection of the concept that the Government

mon law concept of fair trial according to the decisions on unreasonable and unjustified prosecutorial delays, see pp. 13-15, *supra,* enforced a right of the accused to obtain dismissal of criminal actions brought against him only after such delays. Consequently, the most reasonable interpretation of the Speedy Trial language of the Sixth Amendment is that it was intended to require all reasonable speed prior as well as subsequent to indictment.[21] There is every reason to conclude that

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could prosecute at any place whatsoever. Identically, the Framers did not intend to permit the Government to initiate formal prosecution at any time it elected.

If there is any Latin maxim that is pertinent to the "*tempus*" portion of the maxim cited by the Government, it is one of insistence on reasonably prompt action, "*accusator post rationabile tempus non est audiendus, nisi se bene de omissione excusaverit.*" Jowitt, *The Dictionary of English Law* 34 (1959). While it is true that this "maxim is not of general application in English law", the point is that it was "cited in the Star Chamber upon the hearing of a charge against sundry persons who were charged with conspiring to bring a charge of murder sixteen years after the death of the man alleged to have been murdered (*Sir Anthony Ashley's Case* (1612) Moore 816)." *Ibid.* Certainly the Framers of the Sixth Amendment were dedicated to proscribing the procedures followed in obtaining convictions in the Star Chamber. The Public Trial Clause is an unmistakable reflection of this major purpose. See *In Re Oliver,* 333 U.S. 257, 266-272 (1948).

[21] The facts and considerations demonstrated in this Brief have evidently not been considered by the lower Court decisions which have sought to restrict the applicability of the Sixth Amendment to the post-indictment period; *cf. Dickey v. Florida,* 398 U.S. 30, 39 (1970) (concurring opinion). See, e.g., *Nickens* v. *United States,* 323 F.2d 808 (D.C.Cir. 1963), *cert. denied,* 379 U.S. 905 (1964); *Kroll* v. *United States* 433 F.2d 1282 (5th Cir. 1970), *cert. denied,* 402 U.S. 944 (1971); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959); *United States* v. *Panczo,* 367 F.2d 737 (7th Cir. 1966); *Terlikowski v. United States;* 379 F.2d 501 (8th Cir. 1967); *Benson* v. *United States,* 402 F.2d 576 (9th Cir. 1968);

those who adopted the Bill of Rights had that same innate sense of justice which impelled the English common law judges to condemn unreasonable and unjustified pre-indictment delays.

CONCLUSION

The Constitutional imperatives of fair trial, Due Process and Speedy Trial, and the values and policies which they embody of the integrity and effectiveness of the administration of criminal law and the preservation of fundamental individual rights, compel judicial preclusion of unreasonable and unjustified delays in prosecutorial actions, prior as well as subsequent to the formal commencement of the criminal action. Accordingly, for the reasons set out in the Briefs for Appellees

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United States v. *Reed*, 413 F.2d 338 (10th Cir. 1969), *cert. denied sub nom. Sartain* v. *United States*, 397 U.S. 954 (1970).

But see, Petition of Provoo, 17 F.R.D. 183 (D.Md. 1955), *aff'd sub nom. United States* v. *Provoo*, 350 U.S. 857 (1955); *United States* v. *Wahrer*, 319 F. Supp. 585 (D. Alaska 1970); *United States* v. *Kojima*, 3 Hawaii Fed. 381 (1909); see also *Mann* v. *United States*, 304 F.2d 394, 396-397, n. 4 (D.C.Cir. 1962); *Schlinsky* v. *United States*, 379 F.2d 735 (1st Cir. 1967); *United States* v. *Feinberg*, 383 F.2d 60 (2d Cir. 1967); *United States* v. *Sanchez*, 361 F.2d 824 (2d Cir. 1966); *United States* v. *Dickerson*, 347 F.2d 783 (2d Cir. 1965); *United States* v. *Simmons*, 338 F.2d 804 (2d Cir. 1964), *cert. denied*, 380 U.S. 983 (1965); *United States* v. *Harbin*, 377 F.2d 78 (4th Cir. 1967); *Lucas* v. *United States*, 363 F.2d 500 (9th Cir. 1966); *Sanchez* v. *United States*, 341 F.2d 225 (9th Cir. 1965), *cert. denied*, 382 U.S. 856 (1965); *Acree* v. *United States*, 418 F.2d 427 (10th Cir. 1969); *United States* v. *Reed*, 285 F. Supp. 738 (D.D.C. 1968); *United States* v. *Parrott*, 248 F. Supp. 196 (D.D.C. 1965); *United States* v. *Miller*, 259 F. Supp. 294 (E.D.Pa. 1966); *United States* v. *Hunter Pharmacy, Inc.*, 213 F. Supp. 323 (S.D.N.Y. 1963); *Jones* v. *Superior Court of Los Angeles County*, 3 Cal.3d 734, 91 Cal. Rptr. 578 (1971).

and in this Brief, the judgment below, dismissing the indictment herein, should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

No. 70-19

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE SAMUEL C. CRATCH

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BRIEF FOR APPELLEE SAMUEL C. CRATCH

QUESTIONS PRESENTED

The appellee Samuel C. Cratch adopts the Government's statement of Question 1 and the appellee Marion's restatement of Questions 2 through 4.

COUNTERSTATEMENT

The appellee Samuel C. Cratch adopts the Counterstatement as made by the appellee William R. Marion.

SUMMARY OF ARGUMENT

The appellees Samuel C. Cratch and William R. Marion stand in the same position on the questions raised in this appeal. The filing of a joint brief would have been preferable, but the respective circumstances of the appellees did not permit such.

The brief for appellee William R. Marion is an excellent presentation of the same points that the appellee Cratch feels dispositive of his case and he hereby adopts the general and specific arguments as presented and the cases cited in support thereof. To do otherwise would be more a matter of repetition without necessarily contributing anything further to the appellee Cratch's position.

Treading the path of reason and law prepared by the appellee Marion, one finds both cogent and compelling the manner and form of presentation.

The appellee Cratch does feel that some additional comment and argument would be appropriate in certain instances and, accordingly, his method of presentation will be to highlight and, hopefully, develop certain aspects.

ARGUMENT

I. THE RULING OF THE DISTRICT JUDGE MAY NOT BE APPEALED DIRECTLY TO THIS COURT

The Order Granting Appellee's Motion to Dismiss the Indictment Did Not Sustain a "Motion in Bar" Under Former Title 18, U.S.C., § 3731.

The appellees' position regarding the jurisdiction of the Court was well presented in their Motion to Dismiss or Affirm.

The appellee Marion's position in his brief on the merits is well taken and further supported by the fact that the Government in its attempted reliance upon *U.S. v. Weller*, 401 U.S. 254 (1971), contended that that case was

> . . . where the defendant did not deny that he had committed the acts charged or that those acts constituted a crime but nevertheless urged that he could not be prosecuted because of some extraneous factor. . . . [Br. 13-14]

This contention crumbles upon a reading of the *Weller* opinion (¶ 3), in which Justice Stewart states:

> He has not confessed to a crime and claimed an immunity from prosecution; *he argues that he has committed no crime.* [Emphasis supplied.]

Accordingly, as the appellee Marion correctly pointed out, the import of the *Weller* decision is not to support the jurisdiction of this Court, but rather to disclaim it.

II. THE DISTRICT JUDGE PROPERLY EXERCISED HIS DISCRETION IN DISMISSING THE INDICTMENT FOR UNNECESSARY DELAY IN PRESENTING THE CHARGE TO A GRAND JURY

The Accusations of Crime and the Identity of the Accused Were Common Knowledge in the Community, and the Defendant's Records in the Possession of the Government, Several Years Before the Indictment was filed.

> *Accusator Post Rationabile Tempus Non Est Audiendus, Nisi Se Bene De Omissione Excusaverit.* (Moore, 817)

The Government has failed to offer any explanation for the extraordinary delay, other than low priority on an understaffed office list. There is no dispute that the delay was a lengthy one. It is urged upon this Court that even if there was this procrastination, there was no obligation to prosecute at any given time. As one justification as to why the Government should not be required to prosecute at any particular point, it is suggested that where there is concurrent federal–state jurisdiction, the state should have the primary responsibility for instituting criminal proceedings and the federal prosecutor should wait and see what position the state assumes. No such rationale can be applied

to the instant case! If repetition can add significance, then the District Judge's ruling on the appellees' Motion to Dismiss or Affirm should be reread.

> The Court, therefore, views that there has been a lack of speedy prosecution *in this case*, and will grant the Motion to dismiss. (App. 39) (Emphasis supplied.)

The Government cavalierly dismisses the impact of the delay upon the powers of recall by reference to both extent and terminated civil actions against the appellees that involve the same fraudulent scheme for which the Government indicted them. (Br. 7, n. 2) Under scrutiny these cases make untenable the Government's position as asserted against appellee Cratch.[1]

It is also deemed significant that the appellee Cratch did not have possession of the documents or records *before* they were turned over to the Government. (App. 13, 31-34)

The Government can find no solace with respect to appellee Cratch by reference to the Federal Trade Commission

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[1] *Crutchfield v. Allied Enterprises, et al.*, C.A. 1916-66, wherein appellee Cratch was not named, served or mentioned.

Harris v. Allied Enterprises, et al., C.A. 1917-66, wherein appellee Cratch was not named, served or mentioned.

Talbert v. Cratch, et al, C.A. 1950-66, wherein appellee Cratch was never personally served and an appearance was entered by the firm currently representing appellee Marion. Case settled and dismissed with prejudice without Cratch ever having been involved, as of December 30, 1968.

Elliott v. Atlas Credit Corp., et al., C.A. 2629-66, wherein appellee Cratch was named, not personally served, and case dismissed as to Cratch on August 29, 1968 by request of plaintiff.

Hawkins v. Allied Enterprises, et al., C.A. 253-67, wherein appellee Cratch was not named, served or mentioned.

Johnson v. Allied Enterprises, et al., C.A. 2458-67, again appellee Cratch was not named, served or mentioned.

Benson, et al., v. Allied Enterprises, Cratch, Marion, et al., C.A. 2451-68, wherein improper service upon Cratch was quashed as of October 27, 1970, a date well after the indictment in question.

proceedings or hearings, since appellee Cratch was not named in those proceedings either.

It is suggested that the Government grabbed the wrong end of the sword it attempted to forge out of advertence to the civil suits. Being cognizant of such litigation—which admittedly involved many of the same complainants listed in the indictment—the prosecution could and should have moved more rapidly than it did. When it did not, the District Judge dismissed the eventual indictment, which was both in his power and discretion so to do. Such ruling should not be disturbed.

III. THE SIXTH AMENDMENT RIGHT TO SPEEDY TRIAL SHOULD ATTACH AND OBTAIN THROUGHOUT THE CONTINUUM OF CRIMINAL LAW ENFORCEMENT FROM OFFENSE TO COMPLETION OF PUNISHMENT

An Accused Should Be Tried, Subject to the Requirements of Ordered Expedition, Within a Reasonable Time After the Government Discovers, or Should Have Discovered in the Exercise of Due Diligence, That a Crime Has Been Committed by Him.

Justice Brennan in a prescient concurring opinion in *Dickey v. Florida*, 398 U.S. 30 (1970), posed the question to which this Court may now respond:

> Can it be that one becomes an "accused" only after he is indicted, or that the Sixth Amendment subdivides "prosecution" into various stages, granting the right to speedy trial in some and withholding it in others? [at p. 43]

The Government contends that the protection of the Sixth Amendment cannot apply prior to an indictment. They mount much of their argument around the query as to at what point in time an individual becomes an "accused." In the discussion in *Dickey v. Florida, supra*, this point was addressed against the background of *Escobedo v. Illinois*, 378 U.S. 478 (1964), when the court spoke of the time when

> . . . investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.

While the Government does not accept the logical extension of such ruling, so as to bring the instant case within the ambit of or under the aegis of the Sixth Amendment, it does concede certain policies to be considered when viewing the question of a right to a speedy trial.

> In *United States v. Ewell, supra,* 383 U.S. at 120, this Court recognized that the Sixth Amendment's guarantee of a speedy trial is an "important safeguard [1] to prevent undue and oppressive incarceration prior to trial, [2] to minimize anxiety and concern accompanying public accusation and [3] to limit the possibilities that long delay will impair the ability of an accused to defend himself." (Br. 18)

The appellee Cratch concurs with the Government that the first of these policies is not germane to the issues in this case.

The second policy is not thought by the Government to be appropriate in a discussion of this case, despite the series of The Washington Post articles. It pursues tortuous reasoning to argue that the implications of the series of newspaper articles were not such that would constitute public accusation. By grammatical gymnastics the Government urges that such implications that there may have been were not attributed to the United States Attorney and, thus, no step need be taken to "minimize anxiety and concern." (Br. 19)

Resort to no higher court than common sense and semantics would demonstrate the frailty of that situation. The articles are replete with references to the United States Attorney's office, the United States Attorney, and kudos for the assault the United States Attorney's office was making upon such practices and people identified in the articles.

The articles certainly had an impact upon the life of appellee Cratch and both he and his friends certainly viewed

it as a public accusation. It is interesting to note that most "proper" indictments gain less notoriety than did the United States Attorney's "no indictment" approach.

The discussion concerning the third policy of impairing the ability of an accused to defend himself has been comprehensively explored and eloquently presented by the appellee Marion.

Thus the policies conceded by the Government to invoke the Sixth Amendment cry out for consideration in the instant case.

It is contended that prejudice attaches by the delay itself, even though it is further contended that prejudice need not be shown in the instant case.

> Indeed the delays in trials are often one of the greatest threats to individual rights. Both the accused and the public are entitled to a prompt trial. (*State of Federal Judiciary*, Remarks of Chief Justice Warren E. Burger, ABA convention, St. Louis, August 10, 1970.)

The appellee Cratch shares Justice Brennan's view when he stated in *Dickey v. Florida, supra*, at 55:

> Arguments of some force can be made that the guarantee attaches as soon as the government decides to prosecute and has sufficient evidence for arrest and indictment; . . . Insofar as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded.

The time and the case for such "hospitable interpretation" is now.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed as without the jurisdiction of the Court. Alternatively, as a matter of the proper scope of review of a discretionary ruling of a trial court or upon a proper interpretation of

the Sixth Amendment as applied to the circumstances of this case, the order of the District Court from which this appeal is taken should be affirmed.

Respectfully submitted,

Benjamin Wright Cotten

Attorney for Appellee
Samuel C. Cratch

August 1971.

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM R. MARION AND SAMUEL C. CRATCH

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

With respect to the major issues in this case, neither the briefs for appellees nor the *amicus curiae* brief for the National Association of Criminal Defense Lawyers raise points which we believe require reply. Our original brief presents our position (a) that the Sixth Amendment right to a speedy trial is not applicable to time elapsing before arrest or indictment, (b) that the Fifth Amendment right to due process does reach preindictment, prearrest delay if the government intentionally delays prosecution to impair a potential defendant's ability to defend, but does not bar trial and conviction in this case, and (c) that, even if the due process clause reaches some other instances of delay, appellees have not shown, or even

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alleged, facts that would indicate either real and substantial prejudice or unjustifiable government delay.

This reply brief deals with certain arguments of the appellees and *amicus curiae* regarding (1) the appealability of the case to this Court, (2) the coverage of Rule 48(b) of the Federal Rules of Criminal Procedure, and (3) the scope of the right to a speedy trial under the common law of England.

1. Contrary to appellees' argument, Brief for Appellee Marion, pp. 6–9, it is clear that the judgment of the district court was a judgment sustaining a motion in bar within the meaning of former 18 U.S.C. 3731. Appellees do not contend that jeopardy has attached; but they do urge that the judgment below is not a "bar" to future prosecution. The theory of the cases they cite is that at least some dismissals for want of prosecution do not necessarily end the case, the assumption being that if delay is between indictment and trial, the government, after dismissal, may reindict for the same offense and afford a speedy trial. There is no way, however, that the government can cure preindictment delay if that is the basis for dismissal of an indictment, and a judgment of dismissal for such delay thus plainly operates as a bar to further prosecution. In *United States* v. *Ewell*, 383 U.S. 116, the Court unanimously treated a dismissal for failure to grant a speedy trial as a judgment sustaining a motion in bar. Moreover, judgments based on statutes of limitations, identical in effect to the judgment below, are clearly considered judgments sustaining "motions in bar." See, *e.g.*, *United States* v.

Goldman, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78; *United States* v. *Weller*, 401 U.S. 254, 260. Not only does the district court's judgment fall squarely within the definition of a judgment sustaining a motion in bar in *United States* v. *Weller*, 401 U.S. 254, 260, it meets even the more limiting requirement of Mr. Justice Stewart's dissenting opinion in *United States* v. *Mersky*, 361 U.S. 431, 457, since it is based on new matter not alleged in the indictment.

That a motion in bar is like a plea of confession and avoidance does not mean, as appellees intimate, that one making such a plea must admit guilt. Such an admission is not made in pleas claiming *autrefois acquit* or raising the statute of limitations, yet these are examples of pleas by way of confession and avoidance. See *United States* v. *Mersky*, 361 U.S. at 457–458 (Stewart, J., dissenting). It is enough that the plea sets up by way of defense a claim that bars conviction whether or not the defendant is guilt. This is precisely the effect of the motion to dismiss made in this case.

2. Appellees contend that the district court's dismissal of the indictment was under Rule 48(b), Fed. R. Crim. P. (Brief for Appellee Marion, pp. 10–11). Appellees' "Motion to Dismiss Indictment for Failure to Afford Speedy Trial" (App. 12–14) is cast in constitutional terms and makes no reference to Rule 48(b); neither in the Memorandum in Support of the Motion (App. 15–21) nor during the proceedings before Judge Hart (App. 22–39), in which the constitutional arguments were developed, did counsel rely on Rule

48(b). When Judge Hart granted appellees' motion to dismiss on the basis that "there has been a lack of speedy prosecution" (App. 39), he was relying on the constitutional grounds advanced by counsel. Had he meant to rely on Rule 48(b) in the absence of any reliance on that rule by counsel, he presumably would have said so.

In any event, as pointed out in our original brief (p. 14, n. 6), that rule has no applicability to this kind of case. It authorizes dismissal when the government has delayed in presenting the charge to a grand jury against a defendant "who has been held to answer to the district court." That phrase has a specific meaning in the Federal Rules of Criminal Procedure; it refers to the action taken by a United States Commissioner with respect to a defendant when the defendant has waived a preliminary examination or the commissioner has determined at a preliminary examination that there is probable cause that an offense has been committed and that the defendant has committed it. Rule 5(c), Fed. R. Crim. P. The part of Rule 48(b) that reaches delay in presenting the charge to the grand jury is designed to protect against unnecessary delay between the time the government formally acts against a defendant by arresting him and bringing him before the commissioner for a preliminary examination and the time of indictment. That part of the Rule has no relevance for cases such as this where the indictment is the first formal action taken against a defendant.

3. The Brief for the National Association of Criminal Defense Lawyers as *amicus curiae* presents a misleading picture of the state of the law at the time the Bill of Rights was adopted. The *amicus* does not deny that there was, and is, no general law of prescription in England, or that convictions were returned as long as thirty-five years after an alleged offense. 2 Stephen, *A History of the Criminal Law of England* 2 (1883). But the *amicus* seeks to construct out of a handful of lower court decisions (Br. 13–15) a rule that time-lapses between offense and formal accusation were generally a basis for dismissing criminal charges. Only one of those cases predates the Bill of Rights. In that case, *Rex* v. *Robinson*, 1 W. Black. 541, 96 Eng. Rep. 313 (K.B. 1765), private persons, who themselves were being prosecuted for bribery, moved for an information against someone they claimed had committed bribery in connection with an election two years earlier. Considering the unexplained time it had taken these "prosecutors" to come forward, the character of the prosecutors, and the improbability that the offense had in fact been committed (since the candidate on whose behalf the bribe was allegedly made was unopposed), the court discharged a rule to show cause. The case turns in large part on the special characteristics of informations, which traditionally had been granted on application as a matter of course, and the decision represents the court's refusal to carry forward an ap-

parently malicious and ill-founded private prosecution.

Regina v. *Robins*, 1 Cox's C.C. 114 (Somerset Winter Assizes, 1844), which the *amicus* calls the "classic common law statement," is similarly a decision designed to prevent malicious private prosecution. There the private "prosecutor" waited two years before coming forward and claiming to have witnessed the defendant commit the crime of bestiality. The court directed an acquittal because it recognized the severe difficulty of presenting an alibi defense so long after the alleged crime. *Regina* v. *Hext*, 4 Jurist 339 (Bail Court 1840), apparently turns on the fact that at the time the applicant sought a criminal information for an alleged insult, it was clear that there was no likelihood of a breach of the peace resulting from the insult. In *Rex* v. *Marshall and Grantham*, 13 East 322, 104 Eng. Rep. 394 (K.B. 1811), the court declined to enter a rule *nisi* for an information during a term in which defendants would not have time to show cause, but there is no indication that such a rule would not be issued at an earlier stage of a subsequent term.

These cases hardly stand for a general rule that a lapse of time between offense and indictment will result in dismissal of the indictment. At most, they indicate that a prosecution may not be entertained if a private complainant who claims to have witnessed a secret offense unreasonably delays in coming forward. With regard to such offenses, this kind of delay is likely to impair sharply the most effective defense—one based on alibi—and concomitantly, it enhances the

possibility of malicious prosecution or extortion. See Wharton's *Criminal Pleading & Practice,* § 326 (9th ed. 1889). Insofar as these cases relate to the alibi defense, they may have some relevance for problems such as those considered in *Ross* v. *United States,* 349 F. 2d 210 (C.A.D.C.), and similar cases, see *Nickens* v. *United States,* 323 F. 2d 808, 810, n. 2 (C.A.D.C.), certiorari denied, 379 U.S. 905, although the fact that in this country the prosecution is brought by the government rather than a private individual diminishes the threat of malicious prosecution or extortion, which are the main dangers to be avoided. In any event, the English cases cited by the *amicus* have no applicability to charges of the kind involved here, and certainly fall far short of reflecting any general common law rule in England prohibiting prosecutions after a lapse in time from the alleged offense to indictment.

As our original brief points out (pp. 15–17), the conception of a speedy trial at the time the Bill of Rights was adopted related to the period between formal accusation and trial. The *amicus* is quite correct to note (pp. 35–37) that then, as now, there were significant steps in the criminal process that might occur before indictment. But the issue in this case concerning the interpretation of the Sixth Amendment is not whether one can become "accused" before indictment; it is whether one becomes "accused" before any formal legal action of an accusatory nature is taken. In this connection, history leads to the same conclusion as language and sound judicial administration: that the Sixth Amendment does not

apply to the period before formal accusatory action has been taken.

Respectfully submitted.

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NOVEMBER 1971.

U.S. GOVERNMENT PRINTING OFFICE 1971

UNITED STATES v. MARION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 70–19. Argued November 8, 1971—Decided December 20, 1971

Appellees, claiming that the Government had known of the crimes with which they were charged, the circumstances of the crimes, and appellees' identities for over three years before they were indicted, moved to dismiss on the ground that the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses," and that the delay deprived them of rights to due process of law and a speedy trial as secured by the Fifth and Sixth Amendments. While asserting no specific prejudice, appellees contended that the indictment required memory of many specific acts and conversations occurring several years before and that the delay was due to the prosecutor's negligence or indifference in investigating the case and presenting it to the grand jury. The District Court, after a hearing, granted appellees' motion and dismissed the indictment for "lack of speedy prosecution," having found that the defense was "bound to have been seriously prejudiced" by the three-year delay. The Government took a direct appeal to this Court, which postponed consideration of the question of jurisdiction until the hearing on the merits. *Held:*

1. The motion to dismiss the indictment for lack of a speedy trial was in the nature of a confession and avoidance and constituted a motion in bar by appellees who had not been placed in jeopardy when the District Court entered its order of dismissal. That order was therefore directly appealable to this Court under former 18 U. S. C. § 3731. Pp. 311–312.

2. The Sixth Amendment's guarantee of a speedy trial is applicable only after a person has been "accused" of a crime, which in this case did not occur until appellees (who had not previously been arrested or otherwise charged) were indicted. Pp. 313–320.

3. The relevant statute of limitations provides a safeguard against possible prejudice resulting from pre-accusation delay, and here appellees were indicted within the applicable limitations period. Pp. 320–323.

4. Though the Due Process Clause may provide a basis for dismissing an indictment if the defense can show at trial that prosecutorial delay has prejudiced the right to a fair trial, appellees have not claimed or proved actual prejudice resulting from the delay and their due process claims are therefore speculative and premature. Pp. 325–326.

Reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the result, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 326.

Deputy Solicitor General Greenawalt argued the cause for the United States. With him on the briefs were *Solicitor General Griswold*, *Assistant Attorney General Wilson*, *Acting Assistant Attorney General Petersen*, *Beatrice Rosenberg*, and *Mervyn Hamburg*.

Thomas Penfield Jackson argued the cause for appellees and filed a brief for appellee Marion. *Benjamin Wright Cotten* filed a brief for appellee Cratch.

Alan Y. Cole and *Isaac N. Groner* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

This appeal requires us to decide whether dismissal of a federal indictment was constitutionally required by reason of a period of three years between the occurrence of the alleged criminal acts and the filing of the indictment.

On April 21, 1970, the two appellees were indicted and charged in 19 counts with operating a business known as Allied Enterprises, Inc., which was engaged in the business of selling and installing home improvements such as intercom sets, fire control devices, and burglary detection systems. Allegedly, the business was fraudu-

lently conducted and involved misrepresentations, alterations of documents, and deliberate nonperformance of contracts. The period covered by the indictment was March 15, 1965, to February 6, 1967; the earliest specific act alleged occurred on September 3, 1965, the latest on January 19, 1966.

On May 5, 1970, appellees filed a motion to dismiss the indictment "for failure to commence prosecution of the alleged offenses charged therein within such time as to afford [them their] rights to due process of law and to a speedy trial under the Fifth and Sixth Amendments to the Constitution of the United States." No evidence was submitted, but from the motion itself and the arguments of counsel at the hearing on the motion, it appears that Allied Enterprises had been subject to a Federal Trade Commission cease-and-desist order on February 6, 1967, and that a series of articles appeared in the Washington Post in October 1967, reporting the results of that newspaper's investigation of practices employed by home improvement firms such as Allied. The articles also contained purported statements of the then United States Attorney for the District of Columbia describing his office's investigation of these firms and predicting that indictments would soon be forthcoming. Although the statements attributed to the United States Attorney did not mention Allied specifically, that company was mentioned in the course of the newspaper stories. In the summer of 1968, at the request of the United States Attorney's office, Allied delivered certain of its records to that office, and in an interview there appellee Marion discussed his conduct as an officer of Allied Enterprises. The grand jury that indicted appellees was not impaneled until September 1969, appellees were not informed of the grand jury's concern with them until March 1970, and the indictment was finally handed down in April.

Appellees moved to dismiss because the indictment was returned "an unreasonably oppressive and unjustifiable time after the alleged offenses." They argued that the indictment required memory of many specific acts and conversations occurring several years before, and they contended that the delay was due to the negligence or indifference of the United States Attorney in investigating the case and presenting it to a grand jury. No specific prejudice was claimed or demonstrated. The District Court judge dismissed the indictment for "lack of speedy prosecution" at the conclusion of the hearing and remarked that since the Government must have become aware of the relevant facts in 1967, the defense of the case "is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968." [1]

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[1] App. 39. The court's oral decision consisted of the following statement: "It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

"The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

"The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss." *Ibid.*

The United States appeals directly to this Court pursuant to 18 U. S. C. § 3731 (1964 ed., Supp. V).[2] We postponed consideration of the question of jurisdiction until the hearing on the merits of the case.[3] We now hold that the Court has jurisdiction, and on the merits we reverse the judgment of the District Court.

I

Prior to its recent amendment, 18 U. S. C. § 3731 (1964 ed., Supp. V) authorized an appeal to this Court

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[2] The Criminal Appeals Act, 18 U. S. C. § 3731 (1964 ed., Supp. V), at the time of this appeal, provided in relevant part:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

. . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890, amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This amendment thus terminated the Court's appellate jurisdiction of Government appeals from district court judgments in federal criminal cases. Pending cases were not affected by the amendment, however, since subsection (b) of § 14 provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971; the appellees in this case were indicted on April 21, 1970.

[3] 401 U. S. 934 (1971).

by the United States when in any criminal case a district court sustained "a motion in bar, when the defendant has not been put in jeopardy." It is plain to us that the appeal of the United States is within the purview of this section. Appellees had not been placed in jeopardy when the District Court rendered its judgment. The trial judge based his ruling on undue delay prior to indictment, a matter that was beyond the power of the Government to cure since re-indictment would not have been permissible under such a ruling. The motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment but was, rather, a plea in the nature of confession and avoidance, that is, where the defendant does not deny that he has committed the acts alleged and that the acts were a crime but instead pleads that he cannot be prosecuted because of some extraneous factor, such as the running of the statute of limitations or the denial of a speedy trial. See *United States* v. *Weller*, 401 U. S. 254, 260 (1971). The motion rested on constitutional grounds exclusively, and neither the motion, the arguments of counsel, the Court's oral opinion, nor its judgment mentioned Rule 48 (b), Federal Rules of Criminal Procedure, as a ground for dismissal.[4] Our jurisdiction to hear this appeal has been satisfactorily established.

[4] Rule 48 (b) provides that: "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint." In any event, it is doubtful that Rule 48 (b) applies in the circumstances of this case, where the indictment was the first formal act in the criminal prosecution of these appellees. See cases cited in n. 11, *infra*.

II

Appellees do not claim that the Sixth Amendment was violated by the two-month delay between the return of the indictment and its dismissal. Instead, they claim that their rights to a speedy trial were violated by the period of approximately three years between the end of the criminal scheme charged and the return of the indictment; it is argued that this delay is so substantial and inherently prejudicial that the Sixth Amendment required the dismissal of the indictment. In our view, however, the Sixth Amendment speedy trial provision has no application until the putative defendant in some way becomes an "accused," an event that occurred in this case only when the appellees were indicted on April 21, 1970.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been "accused" in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time. The Amendment would appear to guarantee to a criminal defendant that the Government will move with the dispatch which is appropriate to assure him an early and proper disposition of the charges against him. "[T]he essential ingredient is orderly expedition and not mere speed." *Smith* v. *United States*, 360 U. S. 1, 10 (1959).

Our attention is called to nothing in the circumstances surrounding the adoption of the Amendment indicating

that it does not mean what it appears to say,[5] nor is there more than marginal support for the proposition that, at the time of the adoption of the Amendment, the prevailing rule was that prosecutions would not be permitted if there had been long delay in presenting a charge.[6] The framers could hardly have selected less

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[5] The history of the speedy trial provision is sparse and unilluminating with respect to the issue before us. See E. Heller, The Sixth Amendment to the Constitution of the United States 31–32, 34 (1951); R. Rutland, The Birth of the Bill of Rights, 1776–1791, p. 202 (1955); I. Brant, The Bill of Rights 223 (1965); Dumbauld, State Precedents for the Bill of Rights, 7 J. Pub. L. 323, 335 n. 91 (1958); Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476, 484 (1968).

[6] A single case which antedates the Bill of Rights, *Rex* v. *Robinson*, 1 Black. W. 541, 96 Eng. Rep. 313 (K. B. 1765), and three 19th century British cases, *Rex* v. *Marshall*, 13 East 322, 104 Eng. Rep. 394 (K. B. 1811); *Regina* v. *Hext*, 4 Jurist 339 (Q. B. 1840); *Regina* v. *Robins*, 1 Cox's C. C. 114 (Somerset Winter Assizes 1844), are cited for the proposition that the framers intended to protect against pre-indictment delay by enacting the Sixth Amendment. These cases fail to establish a definite rule that the Founders sought to constitutionalize, however, and the Government's argument concerning the history of the Sixth Amendment, while not dispositive, is more persuasive. Brief for the United States 15–18. The Government points out that the Habeas Corpus Act of 1679, 31 Car. 2, c. 2, provided for "more speedy Relief of all Persons imprisoned for any such criminal or supposed criminal Matters" and required that persons jailed for felonies or treason be brought to trial upon their own motion within two terms of court or be discharged on bail. The Act does not allude to delay before arrest. Most of the States that ratified the Bill of Rights had either adopted the British Act or passed a similar law, *Petition of Provoo*, 17 F. R. D. 183, 197 n. 6 (Md.), aff'd *sub nom. United States* v. *Provoo*, 350 U. S. 857 (1955), and many of them had speedy trial provisions in their own constitutions which were modeled on the British Act. Article 8 of the Virginia Declaration of Rights, which may have been the model Madison used for the Sixth Amendment, Rutland, *supra*, n. 5, at 202, secured the right to a speedy trial in "criminal prosecutions" where "a man hath a

appropriate language if they had intended the speedy trial provision to protect against pre-accusation delay. No opinions of this Court intimate support for appellees' thesis,[7] and the Courts of Appeals that have considered the question in constitutional terms have never reversed a conviction or dismissed an indictment solely on the basis of the Sixth Amendment's speedy trial provision where only pre-indictment delay was involved.[8]

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right to demand the cause and nature of his accusation." See generally Heller, *supra*, n. 5, at 23. Insofar as this meager evidence is probative at all, it seems to imply that the Sixth Amendment was designed to assure that those accused of crimes would have their trial without undue delay.

[7] This Court has interpreted the Sixth Amendment's speedy trial guarantee in only a small number of cases. See, *e. g.*, *Dickey* v. *Florida*, 398 U. S. 30 (1970); *Smith* v. *Hooey*, 393 U. S. 374 (1969); *Klopfer* v. *North Carolina*, 386 U. S. 213 (1967); *United States* v. *Ewell*, 383 U. S. 116 (1966); *Pollard* v. *United States*, 352 U. S. 354 (1957); *United States* v. *Provoo*, *supra*, n. 6; *Beavers* v. *Haubert*, 198 U. S. 77 (1905). See also *Smith* v. *United States*, 360 U. S. 1, 10 (1959).

[8] Most courts of appeals have recognized the Sixth Amendment right to a speedy trial only after a prosecution has been formally initiated or have held that the sole safeguard against pre-indictment delay is the relevant statute of limitations: *United States* v. *Feinberg*, 383 F. 2d 60, 65 (CA2 1967); *Carlo* v. *United States*, 286 F. 2d 841, 846 (CA2), cert. denied, 366 U. S. 944 (1961); *Pitts* v. *North Carolina*, 395 F. 2d 182, 185 n. 3 (CA4 1968); *United States* v. *Durham*, 413 F. 2d 1003, 1004 (CA5 1969); *Kroll* v. *United States*, 433 F. 2d 1282, 1286 (CA5 1970), cert. denied, 402 U. S. 944 (1971); *United States* v. *Grayson*, 416 F. 2d 1073, 1076–1077 (CA5 1969); *United States* v. *Wilson*, 342 F. 2d 782, 783 (CA5), cert. denied, 382 U. S. 860 (1965); *Donnell* v. *United States*, 229 F. 2d 560, 567 (CA5 1956); *Harlow* v. *United States*, 301 F. 2d 361, 366 (CA5), cert. denied, 371 U. S. 814 (1962); *Bruce* v. *United States*, 351 F. 2d 318, 320 (CA5 1965), cert. denied, 384 U. S. 921 (1966); *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (CA6 1959); *United States* v. *Harris*, 412 F. 2d 471, 473 (CA6 1969); *Lothridge* v. *United States*, 441 F. 2d 919, 922 (CA6 1971); *Parker* v. *United States*, 252 F. 2d 680, 681

Legislative efforts to implement federal and state speedy trial provisions also plainly reveal the view that these guarantees are applicable only after a person has

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(CA6), cert. denied, 356 U. S. 964 (1958); *Edmaiston* v. *Neil*, — F. 2d — (No. 21041) (CA6 1971); *United States* v. *Panczko*, 367 F. 2d 737, 738–739 (CA7 1966); *Terlikowski* v. *United States*, 379 F. 2d 501, 504 (CA8), cert. denied, 389 U. S. 1008 (1967); *Foley* v. *United States*, 290 F. 2d 562, 565 (CA8 1961); *Benson* v. *United States*, 402 F. 2d 576, 579 (CA9 1968); *Venus* v. *United States*, 287 F. 2d 304, 307 (CA9 1960), vacated *per curiam* on other grounds, 368 U. S. 345 (1961); *D'Aquino* v. *United States*, 192 F. 2d 338, 350 (CA9 1951), cert. denied, 343 U. S. 935 (1952); *United States* v. *Reed*, 413 F. 2d 338, 340 (CA10 1969), cert. denied *sub nom. Sartain* v. *United States*, 397 U. S. 954 (1970); *Nickens* v. *United States*, 116 U. S. App. D. C. 338, 340, 323 F. 2d 808, 810 (1963), cert. denied, 379 U. S. 905 (1964). Some courts of appeals have stated that pre-indictment delay may be cause for dismissal but they have seemed to treat the question primarily as one of due process (although the Sixth Amendment is occasionally mentioned) and have required a showing of actual prejudice: *Schlinsky* v. *United States*, 379 F. 2d 735, 737 (CA1 1967); *Fleming* v. *United States*, 378 F. 2d 502, 504 (CA1 1967); *United States* v. *Capaldo*, 402 F. 2d 821, 823 (CA2 1968), cert. denied, 394 U. S. 989 (1969); *United States* v. *Simmons*, 338 F. 2d 804, 806 (CA2 1964), cert. denied, 380 U. S. 983 (1965); *United States* v. *Holiday*, 319 F. 2d 775, 776 (CA2 1963); *United States* v. *Hammond*, 360 F. 2d 688, 689 (CA2 1966); *United States* v. *Dickerson*, 347 F. 2d 783, 784 (CA2 1965); *United States* v. *Rivera*, 346 F. 2d 942, 943 (CA2 1965); *United States* v. *Sanchez*, 361 F. 2d 824, 825 (CA2 1966); *United States* v. *Harbin*, 377 F. 2d 78, 79, 80 n. 1 (CA4 1967); *United States* v. *Lee*, 413 F. 2d 910, 912–913 (CA7 1969), cert. denied, 396 U. S. 1022 (1970); *United States* v. *Napue*, 401 F. 2d 107, 114–115 (CA7 1968), cert. denied, 393 U. S. 1024 (1969); *Lucas* v. *United States*, 363 F. 2d 500, 502 (CA9 1966); *Sanchez* v. *United States*, 341 F. 2d 225, 228 n. 3 (CA9), cert. denied, 382 U. S. 856 (1965); *Acree* v. *United States*, 418 F. 2d 427, 430 (CA10 1969). Although *Petition of Provoo*, 17 F. R. D. 183 (Md.), aff'd, *sub nom. United States* v. *Provoo*, 350 U. S. 857 (1955), is sometimes cited for the proposition that pre-indictment delay will justify dismissal, the District Court explicitly stated that it considered this delay to be relevant only on the issue of whether the

been accused of a crime. The Court has pointed out that "[a]t the common law and in the absence of special statutes of limitations the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the Government or the failure of the grand jury to indict." *United States* v. *Cadarr*, 197 U. S. 475, 478 (1905). Since it is "doubtless true that in some cases the power of the Government has been abused and charges have been kept hanging over the

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defendant had been denied a fair trial. 17 F. R. D., at 202. In *Taylor* v. *United States*, 99 U. S. App. D. C. 183, 238 F. 2d 259 (1956), a conviction was vacated where there had been a six-year delay between the crime (housebreaking) and trial, 3½ years of which was a delay between crime and indictment; the defendant had been in prison on another charge during this time, and the defendant was substantially prejudiced in his ability to defend against the housebreaking charge. The Court of Appeals stated: "We do not rely on the mere lapse of time between the commission of the offenses and the date of indictment, considered by itself, for that is governed by the statute of limitations. It is the combination of the factors set forth above [post-indictment delay, prejudice] which motivates our decision." *Id.*, at 186, 238 F. 2d, at 262. Three district courts have held, however, that "delay" for Sixth Amendment purposes must be computed from the time of the crime or from the time when the Government considers the defendants' actions criminal, and have dismissed indictments for excessive delay: *United States* v. *Parrott*, 248 F. Supp. 196 (DC 1965); *United States* v. *Wahrer*, 319 F. Supp. 585 (Alaska 1970); *United States* v. *Burke*, 224 F. Supp. 41 (DC 1963). There is a unique line of cases in the District of Columbia Circuit concerning pre-indictment delay in narcotics cases where the Government relies on secret informers and (frequently) on single transactions. These cases take a more rigid stance against such delays, but they are based on the Court of Appeals' purported supervisory jurisdiction and not on the Sixth Amendment. See, *e. g.*, *Ross* v. *United States*, 121 U. S. App. D. C. 233, 238, 349 F. 2d 210, 215 (1965); *Bey* v. *United States*, 121 U. S. App. D. C. 337, 350 F. 2d 467 (1965); *Powell* v. *United States*, 122 U. S. App. D. C. 229, 231, 352 F. 2d 705, 707 (1965); *Tynan* v. *United States*, 126 U. S. App. D. C. 206, 208, 376 F. 2d 761, 763 (1967) (explicitly limiting *Ross*).

heads of citizens, and they have been committed for unreasonable periods, resulting in hardship," the Court noted that many States "[w]ith a view to preventing such wrong to the citizen . . . [and] in aid of the constitutional provisions, National and state, intended to secure to the accused a speedy trial" had passed statutes limiting the time within which such trial must occur after charge or indictment.[9] Characteristically, these statutes to which the Court referred are triggered only when a citizen is charged or accused.[10] The statutes vary greatly in sub-

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[9] The provision the Court dealt with in *Cadar* was § 939 of the then District of Columbia Code adopted by Congress, 31 Stat. 1342. That section provided that if any person "charged with a criminal offense shall have been committed or held to bail," the grand jury must act within a specified time or the accused would be set free. The provision remains in the present code as § 23–102 84 Stat. 605, and then, as now, does not purport to reach behind the time of charge, commitment, or holding for bail.

[10] See, *e. g.*, Ill. Rev. Stat., c. 38, § 103–5 (a) (1969); Pa. Stat. Ann., Tit. 19, § 781 (1964); Cal. Pen. Code § 1382 (1970); Va. Code Ann. § 19.1–191 (1960); Nev. Rev. Stat. § 178.556 (1967). A more comprehensive list of such state statutes appears in American Bar Association Project on Standards for Criminal Justice, Speedy Trial 14–15 (Approved Draft 1968). The Administrative Board of the Judicial Conference of the State of New York recently promulgated rules on trial delay and detention which cover defendants who are "held in custody" and which begin computation of delay periods from the date of arrest. Rule 29.1, New York Law Journal, April 30, 1971, p. 1, col. 6. See generally Note, The Right to a Speedy Trial, 20 Stan. L. Rev. 476 (1968); Note, Pre-Arrest Delay: Evolving Due Process Standards, 43 N. Y. U. L. Rev. 722 (1968); Note, Constitutional Limits on Pre-Arrest Delay, 51 Iowa L. Rev. 670 (1966); Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965); Note, Justice Overdue—Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95 (1952).

The rules that the Second Circuit *en banc* recently adopted in *United States ex rel. Frizer* v. *McMann*, 437 F. 2d 1312 (CA2 1971), which appear in Appendix, 28 U. S. C. A. (May 1971 Supp.), require trial within a specified period but apply to "all persons held in jail

stance, structure, and interpretation, but a common denominator is that "[i]n no event . . . [does] the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this." Note, The Right to a Speedy Trial, 57 Col. L. Rev. 846, 848 (1957).

No federal statute of general applicability has been enacted by Congress to enforce the speedy trial provision of the Sixth Amendment, but Rule 48 (b) of the Federal Rules of Criminal Procedure, which has the force of law, authorizes dismissal of an indictment, information, or complaint "[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial . . . ." The rule clearly is limited to post-arrest situations.[11]

Appellees' position is, therefore, at odds with long-standing legislative and judicial constructions of the

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prior to trial" and "defendants" in "all other criminal cases." Rule 2. Rule 4 provides that: "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest." See generally Comment, Speedy Trials and the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, 71 Col. L. Rev. 1059 (1971).

Cf. also S. 895, 92d Cong., 1st Sess., a bill intended "[t]o give effect to the sixth amendment right to a speedy trial for persons charged with offenses against the United States." The protections of the bill are engaged "within sixty days from the date the defendant is arrested or a summons is issued, except that if an information or indictment is filed, then within sixty days from the date of such filing." § 3161 (b) (1).

[11] *Nickens* v. *United States*, *supra*, at 339, 323 F. 2d, at 809; *Harlow* v. *United States*, *supra*; *Hoopengarner* v. *United States*, *supra*; *United States* v. *Hoffa*, 205 F. Supp. 710, 720–721 (SD Fla. 1962).

speedy trial provisions in both national and state constitutions.

III

It is apparent also that very little support for appellees' position emerges from a consideration of the purposes of the Sixth Amendment's speedy trial provision, a guarantee that this Court has termed "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States* v. *Ewell*, 383 U. S. 116, 120 (1966); see also *Klopfer* v. *North Carolina*, 386 U. S. 213, 221–226 (1967); *Dickey* v. *Florida*, 398 U. S. 30, 37–38 (1970). Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer* v. *North Carolina; supra;* see also *Smith* v. *Hooey*, 393 U. S. 374, 377–378 (1969). So viewed, it is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.

Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge.[12] But we decline to extend the reach of the amendment to the period prior to arrest. Until this event occurs, a citizen suffers no restraints on his liberty and is not the subject of public accusation: his situation does not compare with that of a defendant who has been arrested and held to answer. Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend himself.[13] But this

[12] In its Standards Relating to Speedy Trial, n. 10, *supra*, at 6, the ABA defined the time at which the beginning of the delay period should be computed as

"the date the charge is filed, except that if the defendant has been continuously held in custody or on bail or recognizance until that date to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, then the time for trial should commence running from the date he was held to answer." Rule 2.2 (a).

Under the ABA Standards, after a defendant is charged, it is contemplated that his right to a speedy trial would be measured by a statutory time period excluding necessary and other justifiable delays; there is no necessity to allege or show prejudice to the defense. Rule 2.1, *ibid.*

[13] Extending a Sixth Amendment right to a period prior to indictment or holding to answer would also create procedural problems: "[W]hile other rights may be violated by delay in arrest or charge, it does not follow that the time for trial should be counted from any date of inaction preceding filing of the charge or holding the defendant to answer. To recognize a general speedy trial right commencing as of the time arrest or charging was possible would have unfortunate consequences for the operation of the criminal justice system. Allowing inquiry into when the police could have arrested or when the prosecutor could have charged would raise difficult problems of proof. As one court said, 'the Court would be engaged in lengthy hearings in every case to determine whether or not the prosecuting authorities had proceeded diligently or otherwise.' [*United States* v. *Port*, Crim. No. 33162, (ND Cal., June 2,

possibility of prejudice at trial is not itself sufficient reason to wrench the Sixth Amendment from its proper context. Possible prejudice is inherent in any delay, however short; it may also weaken the Government's case.

The law has provided other mechanisms to guard against possible as distinguished from actual prejudice resulting from the passage of time between crime and arrest or charge. As we said in *United States* v. *Ewell*, *supra*, at 122, "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they "are made for the repose of society and the protection of those who may [during the limitation] . . . have lost their means of defence." *Public Schools* v. *Walker*, 9 Wall. 282, 288 (1870). These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced.[14] As this

1952). Quoted in Note, Justice Overdue—Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95, 101–102, n. 34.]" Commentary to Rule 2.2 (a), Speedy Trial, n. 10, *supra*, at 23.

[14] The Court has indicated that criminal statutes of limitation are to be liberally interpreted in favor of repose. *United States* v. *Habig*, 390 U. S. 222, 227 (1968). The policies behind civil statutes of limitation are in many ways similar. They "represent a public policy about the privilege to litigate," *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945), and their underlying rationale is "to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory." *Missouri, Kansas & Texas R. Co.* v. *Harriman*, 227 U. S. 657, 672 (1913). Such statutes "are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected," *Riddlesbarger* v. *Hartford Insurance Co.*, 7 Wall. 386, 390 (1869), they "promote justice by preventing

Court observed in *Toussie* v. *United States*, 397 U. S. 112, 114–115 (1970):

> "The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

There is thus no need to press the Sixth Amendment into service to guard against the mere possibility that pre-accusation delays will prejudice the defense in a criminal case since statutes of limitation already perform that function.

Since appellees rely only on potential prejudice and the passage of time between the alleged crime and the

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surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348–349 (1944), and they "are primarily designed to assure fairness to defendants. . . . [C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965). As in the criminal law area, such statutes represent a legislative judgment about the balance of equities in a situation involving the tardy assertion of otherwise valid rights: "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers* v. *Railway Express Agency*, *supra*, at 349.

indictment, see Part IV, *infra*, we perhaps need go no further to dispose of this case, for the indictment was the first official act designating appellees as accused individuals and that event occurred within the statute of limitations.[15] Nevertheless, since a criminal trial is the likely consequence of our judgment and since appellees may claim actual prejudice to their defense, it is appropriate to note here that the statute of limitations does not fully define the appellees' rights with respect to the events occurring prior to indictment. Thus, the Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused.[16] Cf. *Brady* v. *Maryland*, 373 U. S. 83 (1963); *Napue* v. *Illinois*, 360 U. S. 264 (1959). However, we need not, and could not now, determine when and in what circumstances actual prejudice resulting from pre-accusation delays requires the dismissal of the prosecution.[17] Actual prejudice to the defense of a criminal case may result from the shortest and most necessary delay; and no one suggests that every delay-caused detriment to a defendant's case should abort a criminal

[15] "Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U. S. C. § 3282.

[16] Brief of the United States 26–27.

[17] A number of Courts of Appeal have considered the question. See, *e. g.*, *Benson* v. *United States*, 402 F. 2d, at 580; *Schlinsky* v. *United States*, *supra*; *United States* v. *Capaldo*, *supra*; *United States* v. *Lee*, 413 F. 2d, at 913; *United States* v. *Wilson*, *supra*; *United States* v. *Harbin*, 377 F. 2d, at 80; *Acree* v. *United States*, *supra*; *Nickens* v. *United States*, *supra*, at 340 n. 2, 323 F. 2d, at 810 n. 2.

prosecution.[18] To accommodate the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases.

IV

In the case before us, neither appellee was arrested, charged, or otherwise subjected to formal restraint prior to indictment. It was this event, therefore, which transformed the appellees into "accused" defendants who are subject to the speedy trial protections of the Sixth Amendment.

The 38-month delay between the end of the scheme charged in the indictment and the date the defendants were indicted did not extend beyond the period of the applicable statute of limitations here. Appellees have not, of course, been able to claim undue delay pending trial, since the indictment was brought on April 21, 1970, and dismissed on June 8, 1970. Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them. Appellees rely solely

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[18] Cf. *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966):
"There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring in the result.

I assume that if the three-year delay in this case had occurred *after* the indictment had been returned, the right to a speedy trial would have been impaired and the indictment would have to be dismissed. I disagree with the Court that the guarantee does not apply if the delay was at the pre-indictment stage of a case.

From March 15, 1965, to February 6, 1967, appellees acting through Allied Enterprises, Inc., sold and installed home intercom, fire control, and burglar detection devices in the District of Columbia metropolitan area. Their business endeavors were soon met with a spate of lawsuits seeking recovery for consumer fraud and, on February 6, 1967, their brief career was ended by a cease-and-desist order entered by the Federal Trade Commission. Public notoriety continued to surround appellees' activities and, in a series of articles appearing in the Washington Post in September and October of 1967, their business was mentioned as being under investigation by the United States Attorney. The special grand jury that was impaneled on October 9, 1967, to investigate consumer fraud did not, however, return an indictment against

appellees. Sometime between the summer of 1968 and January 1969, appellees delivered their business records to the United States Attorney, but an indictment was not returned against them until April 21, 1970. The indictment charged some 19 counts of mail fraud, wire fraud, and transportation of falsely made securities in interstate commerce all between September 3, 1965, and January 19, 1966.

Appellees moved "to dismiss the indictment for failure to commence prosecution . . . within such time as to [satisfy the] . . . rights to due process of law and to a speedy trial . . . ." The United States Attorney sought to excuse the delay, alleging that his office had been understaffed at the time and that it had given priority to other types of crimes. The District Court granted appellees' motion [1] and the United States appealed. 18 U. S. C. § 3731 (1964 ed., Supp. V).

The majority says "that it is either a formal indictment or information or else the actual restraints imposed by

[1] In dismissing the indictment, the District Court said:

"It appears to the Court that the matters complained of occurred between March 1965 and January 1966. It further appears that these matters were known from early 1967 or a matter of common knowledge in late 1967. There appears no reason why a three-year delay from 1967 was justified by the necessity of research and examination delving into the various transactions, they could have been discovered and handled much, much sooner, certainly probably during the year 1967 or at the latest early 1968.

"The defendants have been indicted on 19 counts, each of which I believe carries a ten-year sentence, each of which is a separate, distinct transaction which would justify consecutive sentences, and by the very nature of this outrageous scheme if the allegations could be believed, the ability to remember, to build up in one's recollection, to produce the necessary defense, is bound to have been seriously prejudiced by the delay of at least some three years in bringing the prosecution that should have been brought in 1967, or at the very latest early 1968.

"The Court, therefore, views that there has been a lack of speedy prosecution in this case, and will grant the motion to dismiss."

arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision . . . ." *Ante*, at 320.

The Sixth Amendment, to be sure, states that "the accused shall enjoy the right to a speedy and public trial." But the words "the accused," as I understand them in their Sixth Amendment setting, mean only the person who has standing to complain of prosecutorial delay in seeking an indictment or filing an information. The right to a speedy trial is the right to be brought to trial speedily which would seem to be as relevant to pre-indictment delays as it is to post-indictment delays. Much is made of the history of the Sixth Amendment as indicating that the speedy trial guarantee had no application to pre-prosecution delays.

There are two answers to that proposition. First, British courts historically did consider delay as a condition to issuance of an information.

Lord Mansfield held in *Rex* v. *Robinson*, 1 Black. W. 541, 542, 96 Eng. Rep. 313 (K. B. 1765), that the issuance of an information was subject to time limitations: "If delayed, the delay must be reasonably accounted for." In *Regina* v. *Hext*, 4 Jurist 339 (Q. B. 1840), an information was refused where a whole term of court had passed since the alleged assault took place. Accord: *Rex* v. *Marshall*, 13 East 322, 104 Eng. Rep. 394 (K. B. 1811).

Baron Alderson said in *Regina* v. *Robins*, 1 Cox's C. C. 114 (Somerset Winter Assizes 1844), where there was a two-year delay in making a charge of bestiality:

> "It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the

charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."

Second, and more basically, the 18th century criminal prosecution at the common law was in general commenced in a completely different way from that with which we are familiar today. By the common law of England which was brought to the American colonies, the ordinary criminal prosecution was conducted by a private prosecutor, in the name of the King. In case the victim of the crime or someone interested came forward to prosecute, he retained his own counsel and had charge of the case as in the usual civil proceeding. See G. Dession, Criminal Law, Administration and Public Order 356 (1948). Procedurally, the criminal prosecution was commenced by the filing of a lawsuit, and thereafter the filing of an application for criminal prosecution or rule *nisi* or similar procedure calling for the defendant to show cause why he should not be imprisoned. The English common law, with which the Framers were familiar, conceived of a criminal prosecution as being commenced prior to indictment. Thus in that setting the individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment.[2]

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[2] See 1 J. Stephen, History of the Criminal Law of England 493–496 (1883):

"In England, and, so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons, or to public officers who act in their capacity of private persons and who have hardly any legal powers beyond those which belong to private persons." *Id.*, at 493.

For an annotated version of the inception and evolution of the British system, see M. Schwartz, Cases and Materials on Professional Responsibility and the Administration of Criminal Justice 2–3 (Nat. Council on Legal Clinics 1961).

The right to a speedy trial, which we have characterized "as fundamental as any of the rights secured by the Sixth Amendment," *Klopfer* v. *North Carolina*, 386 U. S. 213, 223, protects several demands of criminal justice: the prevention of undue delay and oppressive incarceration prior to trial; the reduction of anxiety and concern accompanying public accusation; and limiting the possibilities that long delay will impair the ability of an accused to defend himself. *Smith* v. *Hooey*, 393 U. S. 374, 377–378 (1969). See also *People* v. *Prosser*, 309 N. Y. 353, 356, 130 N. E. 2d 891, 894 (1955). The right also serves broader interests:

> "The Speedy Trial Clause protects societal interests, as well as those of the accused. The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See *Ponzi* v. *Fessenden*, 258 U. S. 254, 264 (1922). Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction." *Dickey* v. *Florida*, 398 U. S. 30, 42 (1970) (BRENNAN, J., concurring).

At least some of these values served by the right to a speedy trial are not unique to any particular stage of the criminal proceeding. See Note, 43 N. Y. U. L. Rev. 722, 725–726 (1968); Note, 77 Yale L. J. 767, 780–783 (1968); Comment, 11 Ariz. L. Rev. 770, 774–776 (1969). Undue delay may be as offensive to the right to a speedy trial before as after an indictment or information. The anx-

iety and concern attendant on public accusation may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed, the protection underlying the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance promptly to defend himself in a court of law. Those who are accused of crime but never tried may lose their jobs or their positions of responsibility, or become outcasts in their communities.

The impairment of the ability to defend oneself may become acute because of delays in the pre-indictment stage. Those delays may result in the loss of alibi witnesses, the destruction of material evidence, and the blurring of memories. At least when a person has been accused of a specific crime, he can devote his powers of recall to the events surrounding the alleged occurrences. When there is no formal accusation, however, the State may proceed methodically to build its case while the prospective defendant proceeds to lose his.[3]

The duty which the Sixth Amendment places on Government officials to proceed expeditiously with crim-

[3] Judge Wright recognized this in his concurring opinion in *Nickens v. United States*, 116 U. S. App. D. C. 338, 343, 323 F. 2d 808, 813 (1963):

"Indeed, a suspect may be at a special disadvantage when complaint or indictment, or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. Witnesses disappear. With each day, the accused becomes less able to make out his defense. If, during the delay, the Government's case is already in its hands, the balance of advantage shifts more in favor of the Government the more the Government lags. Under our constitutional system such a tactic is not available to police and prosecutors."

inal prosecutions would have little meaning if those officials could determine when that duty was to commence. To be sure, "[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances." *Beavers* v. *Haubert*, 198 U. S. 77, 87 (1905). But it is precisely because this right is relative that we should draw the line so as not to condone illegitimate delays whether at the *pre-* or the *post*-indictment stage.[4]

Our decisions do not support the limitations of the right to a speedy trial adopted in the majority's conclusion that "the [Sixth] amendment [does not extend] to

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[4] "[A] preprosecution delay can result in the loss of physical evidence, the unavailability of potential witnesses, and the impairment of the ability of the prospective defendant and his witnesses to remember the events in question. Indeed, the possibility of such prejudice may be greater in preprosecution-delay cases than in post indictment-delay cases. The typical prospective defendant is probably unaware of the fact that criminal charges will eventually be brought against him. Thus, he will have no reason to take measures to preserve his memory or the memories of his witnesses. 'The importance of these considerations becomes clear when measured against the state's ability to collect and document evidence as it carries out its criminal investigation, thereby preserving its probative firepower until the time of eventual arrest.'

"The causal factor also can be present in a preprosecution delay. Many preprosecution delays are caused by the reluctance of the government to terminate an undercover investigation. If the knowledge obtained by an undercover agent is used as the basis for an arrest or for the issuance of a complaint, the identity of the agent may be exposed and his effectiveness destroyed. Consequently, the government will often delay arresting an individual against whom its case is complete if the agent is still obtaining evidence against other individuals. In such a situation, the government has made a deliberate choice for a supposed advantage. While this advantage is arguably not sought vis-à-vis the defendant asserting the speedy-trial claim, the fact remains that the advantage arises out of a deliberate and avoidable choice on the part of law-enforcement authorities." Note, 20 Stan. L. Rev. 476, 489.

the period prior to arrest." *Ante,* at 321. In *Miranda* v. *Arizona,* 384 U. S. 436, 444 (1966), we held that it was necessary for the police to advise of the right to counsel in the pre-indictment situation where "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." That case, like the present one, dealt with one of the rights enumerated in the Sixth Amendment to which an "accused" was entitled. We were not then concerned with whether an "arrest" or an "indictment" was necessary for a person to be an "accused" and thus entitled to Sixth Amendment protections. We looked instead to the nature of the event and its effect on the rights involved. We applied the *Miranda* rule even though there was no "arrest," but only an examination of the suspect while he was in his bed at his boarding house, the presence of the officers making him "in custody." *Orozco* v. *Texas,* 394 U. S. 324, 327. We should follow the same approach here and hold that the right to a speedy trial is denied if there were years of unexplained and inexcusable pre-indictment delay.

Dickey v. *Florida, supra,* similarly demonstrates the wisdom of avoiding today's mechanical approach to the application of basic constitutional guarantees. While he was in custody on an unrelated federal charge, the petitioner was identified by a witness to the robbery. Petitioner remained in federal custody, but the State did not seek to prosecute him until September 1, 1967, when he moved to dismiss the detainer warrant which had been lodged against him. An information was then filed on December 15, 1967, and petitioner was tried on February 13, 1968. Although the trial took place less than two months after the filing of the information, we held that there had been a denial of the right to a speedy trial because of the delay of more than seven years between the crime and the information.

In a concurring opinion, MR. JUSTICE BRENNAN discussed the broader questions raised by that case:

> "When is governmental delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is 'purposeful or oppressive,' is unjustifiable. . . . The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary. To determine the necessity for governmental delay, it would seem important to consider, on the one hand, the intrinsic importance of the reason for the delay, and, on the other, the length of the delay and its potential for prejudice to interests protected by the speedy-trial safeguard. For a trivial objective, almost any delay could be reasonably avoided. Similarly, lengthy delay, even in the interest of realizing an important objective, would be suspect." 398 U. S., at 51–52.

In the present case, two to three years elapsed between the time the District Court found that the charges could and should have been brought and the actual return of the indictment. The justifications offered were that the United States Attorney's office was "not sufficiently staffed to proceed as expeditiously" as desirable [5] and

[5] The District Judge pointed out that the then Assistant Attorney General had indicated "that he didn't need any more help" and that the United States Attorney retreated from this factual assertion.

that priority had been given to other cases. Appellees say that the present indictment embraces counts such as an allegedly fraudulent telephone conversation made on December 16, 1965. They argue that there is a great likelihood that the recollection of such events will be blurred or erased by the frailties of the human memory. If this were a simpler crime, I think the British precedent which I have cited would warrant dismissal of the indictment because of the speedy trial guarantee of the Sixth Amendment. But we know from experience that the nature of the crime charged here often has vast interstate aspects, the victims are often widely scattered and hard to locate, and the reconstruction of the total scheme of the fraudulent plan takes time. If we applied the simpler rule that was applied in simpler days, we would be giving extraordinary advantages to organized crime as well as others who use a farflung complicated network to perform their illegal activities. I think a three-year delay even in that kind of case goes to the edge of a permissible delay. But on the bare bones of this record I hesitate to say that the guarantee of a speedy trial has been violated. Unless appellees on remand demonstrate actual prejudice, I would agree that the prosecution might go forward. Hence I concur in the result.